No. 20-16375

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,
Intervenor-Plaintiff-Appellee,

KQED, INC.,
Intervenor-Appellee,

v.

GAVIN NEWSOM, Governor, et al.,
Defendants-Appellees,

DENNIS HOLLINGSWORTH, et al.,
Intervenors-Defendants-Appellants.

and

PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda, et al.,
Defendants.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 WHO (Honorable William Orrick)

INTERVENORS-DEFENDANTS' MOTION FOR STAY PENDING APPEAL

RELIEF NEEDED BY AUGUST 12, 2020

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INTRODUCTION

Pursuant to FED. R. APP. P. 8(a), Movants—the official proponents of California's ballot "Proposition 8," who intervened to unsuccessfully defend the constitutionality of that provision in a trial held in 2010 ("Proponents")—respectfully move for a stay pending appeal of the district court's Order (attached as Exhibit 1) requiring the public disclosure and dissemination of video recordings that a panel of this Court unanimously held in 2010 must be kept under seal because their disclosure would necessarily cause grave damage to "the integrity of the judicial process." *Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012). The disclosure of the videotapes at issue—a recording of the 2012 trial over Proposition 8—would seriously harm that interest because the judge presiding over the trial, former Chief Judge Vaughn Walker, unequivocally promised on at least two separate occasions that the recordings would *never be released to the public*, and the attorneys, parties, and witnesses participating in the trial "reasonably relied on [those] specific assurances" in withdrawing their objection to the creation of the recording. *Id.* at 1084. Absent action from this Court, the recordings will be released on **August 12, 2020**, thereby forever vitiating any ability of Movants to appeal from the district court's order and irrevocably harming "the sanctity of the judicial process." *Id.* at 1081.

Pursuant to FED. R. APP. P. 8(a), Proponents moved the district court to stay its ruling unsealing the recordings, but the court denied that request, reasoning that Proponents "are in a position to swiftly seek a stay of the release from the Ninth Circuit." App.5.

The video recording at issue exists for one reason and one reason only: Judge Walker's solemn assurances, in specific response to Proponents' firm objection to the recording of the trial, that he was making the video recording *solely* for his use in chambers in crafting a decision. As this Court held in rebuffing an earlier effort to access and broadcast the recording, Judge Walker both before and after trial made "unequivocal assurances that the video recording at issue would not be accessible to the public," *Perry*, 667 F.3d at 1085—representing, indeed, that any such risk "had been *eliminated*," *id.* (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010)). This commitment was compelled by binding law and "by the Supreme Court's ruling in this very case." *Id.* at 1087-88.

This Court recognized all of this eight years ago, holding in a unanimous opinion by Judge Reinhardt that because of Judge Walker's repeated and solemn assurances, "the integrity of the judicial system" demanded that "the recording must remain under seal." *Perry*, 667 F.3d 1087. While the court below has rejected that contention—ordering that the recordings be unsealed on August 12, 2020—it was wrong to do so. None of the doctrines Respondents have cited as entitling them to

access the trial tapes apply here; and even if they did, the interest in judicial integrity is no less compelling now than it was eight years ago—and the harm that would be caused by releasing the recordings no less grave. Accordingly, Proponents are likely to prevail on the merits, if they are able to obtain this Court's review of the district court's decision. But even more importantly in this context, this Court must act now to stay the disclosure order pending appeal in order to preserve Movant's right to obtain *any appellate review of the district court's decision at all*. For once the recordings at issue have been released, the bell cannot be un-rung, and the status quo will have been immediately and irrevocably changed in a way that forever eliminates Proponents' right to appellate review.

FACTUAL BACKGROUND

1. This case began as a challenge to the constitutionality of California's Proposition 8, which provided that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The suit was assigned to then-Chief Judge Vaughn R. Walker. California declined to defend Proposition 8, but official proponents of the measure and their committee (the movants here) intervened and defended against Plaintiffs' claims.

As the case proceeded, Judge Walker expressed a strong desire to videotape and broadcast the trial, and he importuned counsel for the parties to consent to the idea. Proponents objected to both videotaping and broadcasting the trial, repeatedly

warning that several of their witnesses would decline to testify if the proceedings were broadcast. *See Hollingsworth v. Perry*, 558 U.S. 183, 186, 195 (2010). Despite these objections, and the fact that recording and broadcasting the trial was specifically barred by the court's Local Rule 77-3, Judge Walker proceeded, as the Supreme Court later described, with a precipitous campaign "to revise [the local] rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," in order "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Hollingsworth*, 558 U.S. at 196.

So extraordinary and perilous was Judge Walker's effort that the Supreme Court found it necessary to intervene and halt it—first entering a temporary stay on January 11, 2010 (the first day of the trial), *Hollingsworth v. Perry*, 558 U.S. 1107 (2010), and then extending that stay, on January 13, until the conclusion of any subsequent Supreme Court review. *Hollingsworth*, 558 U.S. at 199. As the Supreme Court explained, Judge Walker's "eleventh hour" attempt to amend the district court's rules to permit public broadcasting of the trial outside the courthouse was procedurally invalid and contrary to the longstanding, considered policy of the Judicial Conference of the United States against such broadcasts, *see id*. at 193–94, 199, as well as the then-existing version of Local Rule 77-3, which had "the force of

law" and prohibited the "public broadcasting or televising" of court proceedings "or recording for those purposes," *id.* at 191 (quoting Rule 77-3).

At the opening of the trial, after the Supreme Court had stayed the broadcast of the trial temporarily, Judge Walker decided, at Plaintiffs' request and over Proponents' objection, to record the proceedings for subsequent public broadcast in case the stay was lifted. At the opening of the proceedings on the 14th, Judge Walker reported that "in light of the Supreme Court's decision yesterday" making the stay permanent, he was "requesting that this case be withdrawn from the Ninth Circuit pilot project." App.25. Proponents then asked "for clarification … that the recording of these proceedings has been halted, the tape recording itself." App.26. When Judge Walker responded that the recording "ha[d] *not* been altered," Proponents reiterated their contention (made in a letter submitted earlier that morning) that, "in the light of the stay, … the court's local rule … prohibit[s] continued tape recording of the proceedings." App.27 (emphasis added). Judge Walker insisted on recording the trial over these objections, stating that Rule 77-3 "permits … recording for purposes of use in chambers," and indicated that the recording "would be quite helpful to [him] in preparing the findings of fact." App.27. He assured Proponents that "that's the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." *Id.* (emphasis added).

Proponents relied on these assurances in acceding to Judge Walker's insistence on continuing the video recording.

After closing argument—during which Plaintiffs received the trial recording and played portions of it at Judge Walker's invitation, App.29, App.34–38—Proponents moved Judge Walker for an order requiring that all copies of the trial recording be returned to the court immediately. *See* App.39. On August 4, 2010, Judge Walker issued his substantive ruling declaring Proposition 8 unconstitutional, and in it, he denied this motion. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010). Instead, he "DIRECTED" the clerk to "file the trial recording under seal as part of the record" and allowed Plaintiffs to "retain their copies of the trial recording pursuant to the terms of the protective order." *Id.* Elsewhere in the same order, Judge Walker stated that "the potential for public broadcast" of the trial proceedings "had been *eliminated*." *Id.* at 944 (emphasis added).

2. Despite Rule 77-3, the Supreme Court's prior decision in this case, the sealing order, and his own solemn commitment in open court, Judge Walker, while delivering a speech at the University of Arizona on February 18, 2011, played a portion of the video recording of the trial. *See* Judge Vaughn Walker, History of Cameras in the Courtroom at 33:13–37:04 (Feb. 18, 2011), *available at* https://goo.gl/ZG8qji. Less than two weeks later, Judge Walker resigned from the

bench, but he continued to display excerpts from the trial recording in connection with his teaching and public speaking. *See* App.43.

Promptly after learning of Judge Walker's activities, Proponents moved this Court (where their appeal was pending) to order the return of all copies of the recording. *See* App.45. On April 15, Plaintiffs opposed that motion and cross-moved to unseal the recording. *See* App.74. The Court transferred the motions to the Northern District, App.91–93, and on September 19, Judge Ware granted Plaintiffs' cross-motion and ordered the recordings unsealed. App.106.

3. Proponents immediately appealed and asked this Court to stay the order lifting the seal. *See* App.110. The Court granted Proponents' motion for a stay, App.139, and in February 2012, in a unanimous decision authored by Judge Reinhardt, it concluded that the district court had abused its discretion in ordering that the seal be lifted, *Perry*, 667 F.3d 1078.

This Court assumed without deciding that the common-law right of access invoked by the district court applied, but found a "compelling reason"—namely, the need to uphold "judicial integrity"—"for overriding the common-law right." *Id.* at 1084-85. The Court focused on Judge Walker's "unequivocal assurances that the video recording at issue would not be *accessible to the public*." *Id.* at 1085 (emphasis added). These statements, the Court concluded, foreclosed any chance that the sealing of the trial recording might "be subject to later modification" because Judge

Walker "promised the litigants that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*." *Id.* at 1086 (first emphasis in original; additional emphases added). In light of these unequivocal assurances, the Court observed, "[i]t would be unreasonable to expect Proponents … to foresee that a recording made for such limited purposes might nonetheless be *released for viewing by the public*, either during or *after the trial*." *Id.* at 1085 (emphases added).

This Court then affirmed "the importance of preserving the integrity of the judicial system," *id.* at 1087, and explained that "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly," *id.* at 1087-88; *see also id.* at 1081. "To revoke Chief Judge Walker's assurances after Proponents had reasonably relied on them," the Court held, "would cause serious damage to the integrity of the judicial process." *Id.* at 1087; *see also id.* at 1088. That same interest, the Court concluded, overcame any First Amendment right to access the recordings, to the extent such a right existed at all.

On August 27, 2012, the district court entered its final judgment and ordered the Clerk to close the case. *See* App.141-42.

4. Less than five years later, KQED, a Respondent here who had intervened in support of Plaintiffs' 2011 attempt to access the video recordings, filed

another motion to unseal the recordings. The motion was referred to Judge William H. Orrick, who ruled on the motion on January 17, 2018. App.6.

The district court accepted KQED's argument that "the common-law right of access applies to the video recordings." App.15. And while Judge Orrick concluded that "the compelling justification identified by the Ninth Circuit in 2012—namely, judicial integrity—continues to exist and precludes release of the video recordings at this juncture," he did not believe that this justification "exists in perpetuity." App.17. Rather, Judge Orrick determined that the duration of the judicial-integrity interest was circumscribed by Civil Local Rule 79-5's provision that "[a]ny document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed"—a period the court calculated would end on August 12, 2020. App.18. The district court provided that any motion by Proponents to continue the seal beyond that date should be filed no later than April 1, 2020. App.20.

Proponents appealed the district court's order, but on April 19, 2019, this Court dismissed the appeal "without prejudice for lack of jurisdiction," concluding that the order was not an appealable final decision in light of the order's invitation of a further motion to continue the seal. App.150.

7. On April 1, 2020, Proponents accepted that invitation and moved the district court to permanently maintain the seal. Respondents opposed, and on July 9,

2020, the court entered an order denying the motion. Once again, the court concluded that the " 'judicial integrity' argument" provides "no justification, much less a compelling one, to keep the trial recordings under seal any longer"—a conclusion the court felt was supported by what it characterized as a "concession" by Proponents' counsel, during the argument before this Court in 2011, purportedly acknowledging "*both* Proponents' knowledge of Civil Local Rule 79-5(g) and that they would bear the burden of having to demonstrate reasons to continue the seal beyond ten years." App.4. The court accordingly reaffirmed its direction that the recordings be unsealed on August 12, 2020. Finally, the court denied Proponents' request that it stay any decision unsealing the tapes pending appeal. App.5.

ARGUMENT

"In deciding a motion to stay an order pending appeal, [this Court] consider[s]: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006-07 (9th Cir. 2020) (quotation marks omitted).

I. PROPONENTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

Proponents are likely to succeed in showing that the court below erred in ordering the disclosure of the trial recordings, since none of the doctrines

Respondents have identified as purportedly allowing them to access the recording apply. *See infra*, Part I.B. But even assuming one of those doctrines *did* require disclosure, Proponents are likely to succeed in showing that the compelling interest in judicial integrity continues to provide an independent, overriding reason to keep the recordings sealed. We begin there.

A. The Compelling Interest in Judicial Integrity Continues To Require Maintaining the Seal.

"[P]ublic perception of judicial integrity" is an "interest of the highest order." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015) (quotation marks omitted). And as this Court squarely held in *Perry*, "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording" in this case. *Perry*, 667 F.3d at 1088.

As this Court recounted at length in *Perry*, Judge Walker provided "unequivocal assurances that the video recording at issue would not be accessible to the public." 667 F.3d at 1085. Unsealing the recording now would renege on those solemn commitments, and thus "would cause serious damage to the integrity of the judicial process," for not only would it result in a palpable injustice to the litigants and witnesses who took Judge Walker at his word, it would put future litigants and witnesses on notice that judicial promises cannot be trusted. *See id.* at 1087.

Proponents consistently opposed broadcast in this trial because they feared that public dissemination of the trial video would subject them and their witnesses

to harassment—concerns that the Supreme Court noted have been "substantiated" by "incidents of past harassment." *Hollingsworth*, 558 U.S. at 195. If Judge Walker's repeated and unequivocal assurances that "there was no possibility that the recording would be broadcast to the public in the future," *Perry*, 667 F.3d at 1086, are now disregarded, that would send a clear message to witnesses—reasonably concerned about testifying because of reasons like these—that they cannot even trust a *blanket assurance* made on the record *by a federal judge* that they will not be exposed to public exposure or harassment in this way.

While Judge Orrick acknowledged "the compelling reason of judicial integrity identified by [this Court]," he thought that interest was not dispositive "because circumstances change and justifications become more or less compelling." App.18. But the importance of judicial integrity has no statute of limitations. No, the imperative that "[l]itigants and the public must be able to trust the word of a judge" is structural and permanent. *Perry*, 667 F.3d at 1087-88. Nor is the judicial-integrity imperative undermined, as Judge Orrick thought, by Proponents' counsel's purported "concession," during the 2011 Argument before this Court, that the duration of the seal protecting the recordings would be governed by Rule 79-5's ten-year default-rule.[1] Counsel's brief suggestion at argument that Rule 79-5 might

[1] Oral Argument at 6:24, *Perry v. Brown*, No. 11-17255 (9th Cir. Dec. 8, 2011), *available at* https://goo.gl/coepDh.

apply does not meet this Court's standards for judicial estoppel, *see Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016), and the court did not contend that it has binding force, App.4. And for the reasons discussed below, the suggestion was incorrect—Rule79-5 does not apply. *See infra*, Part I.B.2. Finally, even if the Rule's ten-year default *did* apply, the only consequence—as counsel explained in 2011—is that Proponents would bear the burden of establishing, after ten years, that there continues to be "good cause" to maintain the seal. The compelling interest in judicial integrity plainly satisfies that standard.

In short, judicial integrity demands that this Court continue to keep faith with Judge Walker's word, and for this reason alone Proponents are likely to succeed in showing that the seal should remain in place.

B. None of the Doctrines Relied Upon by Respondents or the District Court Require Disclosure of the Videotapes.

1. The Common-Law Right of Access.

The district court concluded that disclosure was required by the common law, but that was error for multiple independent reasons.

i. As an initial matter, any common-law right to access the recordings has been displaced by Rule 77-3. While "the courts of this country recognize a general right to inspect and copy public records and documents," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978), this right "is not of constitutional dimension," *Valley Broad. Co. v. United States Dist. Ct. for Dist. of Nevada*, 798

F.2d 1289, 1293 (9th Cir. 1986). Accordingly, the common-law right of access may be displaced by positive law in the same fashion as any other judge-made rule, and the courts have in fact repeatedly found it displaced by positive statutes or rules—including 11 U.S.C. Section 107(b)'s limitations on when bankruptcy-court filings may be disclosed, *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011), and FED. R. CRIM. P. 6(e)'s rules governing recording and disclosure of grand jury proceedings, *see, e.g.*, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). Indeed, the common-law right of access was held to be displaced by the very Supreme Court decision that first recognized it—*Nixon v. Warner Communications*—which held that any right of access to President Nixon's Watergate tapes had been displaced by the Presidential Recordings Act. 435 U.S. at 605-07.

As in these examples, any common-law right of access here has been displaced by a positive enactment: Rule 77-3. Rule 77-3 generally provides that "the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." N.D. CAL. L.R. 77-3. By its plain terms, this provision expressly prohibits not only the "recording … [of] any judicial proceeding," but also the "public broadcasting or televising" of such a recording. *Id.*; *see also Hollingsworth*, 558 U.S. at 184. And the obvious import of the prohibition on

"recording for those purposes" is to extend the prohibition against "public broadcasting or televising" to subsequent broadcasts of recorded proceedings. Accordingly, lifting the seal on August 12 to permit public dissemination and broadcasting of the recordings is plainly contrary to the Rule.

The court below rejected this conclusion, reasoning that "a recording of the proceedings *was made* and was, without separate objection by Proponents, made part of the trial record." App.16. But as this Court has already found, the recording "*was made*," *id.*, because—and *only* because—of Judge Walker's "unequivocal assurances … that the recording was 'not going to be for purposes of public broadcasting or televising,' " *Perry*, 667 F.3d at 1085. Likewise, Proponents did not object to the inclusion of the recordings in the record *only because* of Judge Walker's simultaneous order maintaining them under seal and his solemn, unequivocal promise that any "potential for public broadcast" was thereby "eliminated." *Perry*, 704 F. Supp. 2d at 929, 944. Casting those assurances aside now would be flatly contrary to Rule 77-3, which thus clearly displaces any common-law right to access the recordings.

ii. The common law also does not apply to the recordings because of their derivative nature. In *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), media interests sought access to a videotape of deposition testimony by President Clinton, which he had made pursuant to FED. R. CRIM. P. 15 as a witness in the trial

of two individuals in connection with the Whitewater scandal. The Eighth Circuit held "that the videotape itself is not a judicial record to which the common law right of public access attaches" because of its derivative character. *Id.* at 656. "Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom, we hold that there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony." *Id.* at 657. So too here.

iii. Finally, for the reasons described in Part I.A, the common law right of access cannot justify unsealing the video recordings, even if it applies, because of the compelling interest in judicial integrity. *Perry*, 667 F.3d at 1084.

2. Local Rule 79-5.

In ordering the release of the video recordings, Judge Orrick also relied upon Local Rule 79-5, subsection (g) of which provides that "Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed," unless "a Submitting Party or a Designating Party" shows "good cause at the conclusion of a case" to "extend the sealing to a specific date beyond the 10 years provided by this rule." N.D. CAL. L.R. 79-5(g). For multiple reasons, this Rule also does not justify lifting the seal.

i. To begin, the text of Rule 79-5 makes clear that it addresses documents that a *party* files under seal, not video-recordings lodged in the record *by the court itself*. The Rule is entitled "Filing Documents Under Seal in Civil Cases," and it applies to documents "Electronic[ally] and Manually-Filed" by either "a registered e-filer" or "a party that is not permitted to e-file." Rule 79-5(a). Indeed, the subsection at issue here itself provides that "a Submitting *Party* or a Designating *Party* may … seek an order to extend the sealing." Rule 79-5(g) (emphases added). The Rule is thus plainly addressed to materials filed by parties, not materials created and placed in the record by the court.

ii. Interpreting Rule 79-5(g) as applying to the video recordings also conflicts with the canon that courts must not "construe two statutes [or rules] so that they conflict." *Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008). Reading Rule 79-5(g) to require the public dissemination and broadcast of the recordings after ten years creates a conflict with Rule 77-3, which, as discussed above, specifically *prohibits* the public broadcast of the recordings.

iii. Even if Rule 79-5 *did* apply, the district court at the very least erred *in calculating* when its 10-year period expires. While judgment was not entered in this case—and the case thus was not closed—until August 27, 2012, App.141, Judge Orrick reasoned that the 10-year clock started on August 12, 2010, because the case was "functionally … 'closed' " when Judge Walker entered his permanent injunction

against Proposition 8. App.18 n.20. That "functional" interpretation of Rule 79-5(g) was misguided, and Proponents are likely to succeed in showing that this Court should correct that error.[2]

iv. Finally, Local Rule 79-5(g) itself provides that the seal may be extended beyond the initial ten-year period "upon showing [of] good cause." N.D. CAL. L.R. 79-5(g). The seal accordingly must be maintained even if Rule 79-5 does apply, since the judicial-integrity interest identified by this Court in *Perry* plainly meets that standard. *See supra*, Part I.A.

3. The First Amendment.

Proponents are also likely to show that disclosure is not required by the First Amendment. It is blackletter law that the First Amendment does not even entitle the public to access recordings submitted as evidence of illegal conduct during a criminal trial; in those circumstances, the Constitution is satisfied so long as the trial is open to the public and transcripts of the recordings as played at trial are publicly available. *See, e.g.*, *Nixon*, 435 U.S. at 608-09; *Valley Broadcasting*, 798 F.2d at 1292-93. It follows from the very same reasoning that the First Amendment does not compel access to the recordings here. And in all events, again, the interest of judicial

[2] Two days later, the district court entered another order purporting to make its order of final judgment effective "*nunc pro tunc*" on August 12, 2010. App.146. But plainly a court cannot manipulate Rule 79-5(g) by ordering that a case be deemed to have been closed "*nunc pro tunc*" on a different date.

integrity overcomes any First Amendment right that may apply. *Perry*, 667 F.3d at 1088; *see supra*, Part I.A.

II. PROPONENTS WILL BE IRREPARABLY HARMED ABSENT A STAY.

A. Unless a Stay Is Entered, Proponents' Right To Appeal Will Be Vitiated.

The video-recording will be unsealed on August 12, 2020. At that point, Pandora's box will be irrevocably opened, and Proponents' appeal will become forever moot. Even if this Court were eventually to reverse the district court's order, "[t]he trial will have already been broadcast[ed]," viewed, and copied—all injuries that "cannot be undone," *Hollingsworth*, 558 U.S. at 195, 196. Thus, absent a stay, Proponents will no longer "be able to obtain adequate relief through an appeal," *id.* at 195, and that consideration is fully sufficient to justify a stay pending appeal.

The threat of certain mootness is by definition an irreparable harm to a party seeking appellate review. *See Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986); *see also Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 9 (1942) ("[A]n appellate court should be able to prevent irreparable injury … resulting from the premature enforcement of a determination which may later be found to have been wrong."). All parties have an interest in having their disputes "decided on the merits, as correctly and expeditiously as possible." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Yet without a

stay enabling the Court to "take[ ] the time it needs," the appeal will be an "idle ceremony." *Nken v. Holder*, 556 U.S. 418, 421 (2009). Because Proponents' claims will become moot before they can have their case reviewed, absent a stay, this Court should issue a stay pending appeal to preserve its jurisdiction and the possibility of effective appellate relief.

B. Unless a Stay Is Entered, the Integrity of the Judicial System Will Be Irreparably Harmed.

Public broadcast of the trial threatens grave and lasting "damage to the integrity of the judicial process." *Perry* 667 F.3d at 1087; *see supra* Section I.A. "[P]ublic perception of judicial integrity is" an "interest of the highest order." *Williams-Yulee*, 575 U.S. at 446. Indeed, the Court previously held that the interest in judicial integrity is so compelling that it overcomes any First Amendment or common-law right of access that might apply to the videos at issue. *See Perry* 667 F.3d at 1081. Because the interest in judicial integrity still requires that the video recordings remain sealed, *see supra*, Part I.A, the district court's order will cause devastating and lasting harm to that compelling interest. Far from being a merely philosophical harm, such public distrust would wreak havoc on courts' daily functioning—as litigants would have no choice but to refuse to accept trial judges' assurances, inducing the filing of seemingly pointless appeals to guard against the possibility that the court might one day renege on its word.

Even if the harm to the integrity of the judicial system were less severe, it is settled that the decisive factor in analyzing irreparable injury "focuses on irreparability, irrespective of the magnitude of the injury." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (quotation marks omitted); *see City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 944 F.3d 773, 806 (9th Cir. 2019) (same). It is quite obvious that the harm caused by the disclosure of the trial recordings, whatever its magnitude, will be irreparable the moment the disclosure takes place. As soon as Respondents and other members of the public obtain access to the recordings and the right to disseminate them, they will be free to distribute them far and wide, through the internet and any other means, and it will be impossible to claw them back. A stay is plainly justified for this reason alone. *See Azar*, 911 F.3d at 581.

III. THE REMAINING EQUITABLE FACTORS FAVOR GRANTING A STAY PENDING APPEAL.

The remaining factors likewise favor a stay. Respondents will not be injured by delaying the disclosure of the recordings during the pendency of an appeal. The recordings have been safely under seal for ten years, and Respondents cannot show that they will be seriously harmed if they remain under seal long enough for this Court to pass upon the district court's conclusion that they must now be disclosed. Finally, a stay pending appeal is firmly in the public interest. Proponents have already discussed at length the harms set to befall the public's trust in its judicial

institutions on August 12, and this Court has already concluded that those harms decidedly outweigh any countervailing interest in accessing the recordings. *See supra* Section I.A.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's order pending appeal.

Dated: July 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the word-limit requirements of FED. R. APP. P. 27(d)(2)(A) because it contains 5,173 words, excluding the parts of the motion exempted by Circuit Rule 27-1(1)(d) and FED. R. APP. P. 32(f).

This motion complies with the typeface requirements of FED. R. APP. P. 27(d)(1)(E) and 32(a)(5) and the type style requirements of FED. R. APP. P. 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: July 16, 2020

s/ Charles J. Cooper
Charles J. Cooper
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on July 16, 2020 by using the appellate CM/ECF system. I certify that service will be accomplished on July 16, 2020 by the appellate CM/ECF system on all parties or their counsel. I further certify that on July 16, 2020 I additionally caused a copy of the foregoing to be served via electronic mail on the following parties or their counsel:

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Dated: July 16, 2020

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APPENDIX
OF EXHIBITS

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EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. 09-cv-02292-WHO

ORDER DENYING MOTION TO MAINTAIN SEAL; UNSEALING TRIAL RECORDINGS

Re: Dkt. Nos. 892, 899

On January 17, 2018, I issued an Order on Media Intervenor KQED, Inc.'s motion to unseal the recordings of the bench trial conducted by former Chief Judge Vaughn Walker in 2010 determining that California's Proposition 8 – colloquially known as the ban on gay marriage – was unconstitutional. January 2018 Order [Dkt. No. 878].[1] I concluded that the "common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches. . . ." January 2018 Order at 10. In opposition to the motion, Proponents[2] did not submit evidence that they or their counsel personally feared harm from the recordings' release. But I concluded that the "compelling justification of judicial integrity" outweighed the public's right of access at that juncture.

My concern regarding judicial integrity was based on Judge Walker's unequivocal commitments to the trial participants that he intended the recordings solely for his own use in

[1] The judicial decisions and reasons that led to the bench trial proceedings being recorded but not broadcast, and the numerous appeals of those decisions to the Ninth Circuit and the Supreme Court, are detailed in my January 2018 Order and will not be repeated here.

[2] The Proponents who opposed KQED's motion to unseal and who are the movants on the current motion are defendant-intervenors in the underlying action: Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson. KQED's motion to unseal was joined by plaintiffs in the action, plaintiff-intervenor City and County of San Francisco (CCSF), and amicus American Civil Liberties Union of Northern California (ACLU). Defendant State of California did not join but did not oppose KQED's motion to unseal.

drafting his opinion and the judgment in that case. But I did not find that his statements meant that the recordings should be permanently sealed. Instead, given the guidance in *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012), the prior Ninth Circuit opinion on this subject, I concluded that Northern District Civil Local Rule 79-5(g) and its ten year default for sealing court records set the reasonable limit for sealing the trial recordings, and that on August 12, 2020 the trial recordings would be released unless Proponents offered evidence justifying a continued seal. January 2018 Order at 10-11, 13-15.[3]

I directed that if the Proponents wanted to maintain the seal on the trial recordings past August 12, 2020, they had to file a motion to continue the seal by April 1, 2020 and set a briefing schedule and hearing date. January 2018 Order at 15.[4] They did. Plaintiffs,[5] CCSF, media intervenor KQED,[6] and amicus the ACLU opposed. Dkt. Nos. 895 896, 897, 898. The State of California also opposes the motion to maintain the seal, and now actively contends that the recordings should be unsealed. Dkt. No. 894. In addition, the Reporters Committee for Freedom of the Press (RCFP) filed a request for leave to file an amicus brief on behalf of itself and 36 media entities and journalism organizations in support of KQED and unsealing the recordings.

[3] At the time of the trial, the ten year default was contained in Civil Local Rule 79-5(f).

[4] The Proponents appealed my January 2018 Order. Dkt. No. 880. On April 19, 2019, in a Memorandum Disposition, the Ninth Circuit dismissed the appeal concluding it lacked jurisdiction because my January 2018 Order was not a final decision or a reviewable collateral order. Dkt. No. 888.

[5] Fifteen of plaintiffs' trial witnesses, including the plaintiffs and expert witnesses, submit declarations supporting the release of the trial recordings. The witnesses generally describe their beliefs that release of the trial recordings would serve significant historical purposes (as a watershed moment in the fight for LGBTQ rights), educative functions (allowing the public to observe leading experts discussing relevant theory and research), and show the emotional impact of the trial testimony that they contend is not captured by the written transcript of the proceedings. *See* Dkt. No. 895, Exhibits B-P.

[6] KQED submits declarations from Dean Erwin Chemerinsky (Berkeley Law), Professor Suzanne Goldberg (Columbia Law School), Seth Levy (President and Chairman of the Board of Directors for the It Gets Better Project), McKenna Palmer (LGBTQ supporter and activist), Michael Sabatino (marriage equality advocate), and Scott Shafter (Senior Editor, California Politics & Government at KQED) supporting the release of the trial recordings from their journalistic, legal, historical, and activist perspectives. *See* Dkt. Nos. 898-3 – 898-8.

Dkt. No. 899.[7]

In support of their motion to continue the seal past the ten year default sealing date, Proponents rely solely on the "judicial integrity" argument they raised before. They assert that Judge Walker promised them that he would use the recordings solely for his personal use in drafting the opinion and judgment following the bench trial. Given those assurances, they did not continue to object to the recordings and did not try to convince Judge Walker to stop recording or to seek the assistance of a higher court to force Judge Walker to stop recording. The Proponents contend that the recordings should never be unsealed because of the need to maintain Judge Walker's "promise" as a compelling matter of judicial integrity.

Significantly, the Proponents again failed to submit any evidence by declaration that any Proponent or witness who testified on behalf of the Proponents wants the trial recordings to remain under seal. There is no evidence that any Proponent or trial witness fears retaliation or harassment if the recordings are released. Nor is there any evidence that any Proponent or trial witness on behalf of the Proponents believed at the time or believes now that Judge Walker's commitment to personal use of the recordings meant that the trial recordings would remain under seal forever.

There is attorney argument that the Proponents relied on Judge Walker's commitments

[7] The amici represented by the Reporters Committee of Freedom of the Press (RCFP) are The Associated Press, Berkeleyside Inc., Boston Globe Media Partners, LLC, BuzzFeed, Cable News Network, Inc., California News Publishers Association, Californians Aware, CalMatters, Dow Jones & Company, Inc., The E.W. Scripps Company, Embarcadero Media, First Amendment Coalition, First Look Media Works, Inc., Fox Television Stations, LLC, Gannett Co., Inc., Hearst Corporation, Inter American Press Association, International Documentary Association, Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, Mother Jones, MPA – The Association of Magazine Media, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, TEGNA Inc., Tully Center for Free Speech, and Univision Communications Inc. The amici's motion for leave to file their brief is GRANTED. Dkt. No. 899. The RCFP, on behalf of the other amici, argues generally that release of the recordings would serve "the interests advanced by the common law and First Amendment rights of access to judicial documents" by providing a contemporaneous view of how the trial progressed and would "enhance the completeness of news reports about the trial." Dkt. No. 899-2 at 7-15.

regarding recording the trial proceedings to conclude that the records would never be released.[8] But that is a different position than they took during oral argument at the Ninth Circuit in 2011. Then, Proponents' counsel acknowledged *both* Proponents' knowledge of Civil Local Rule 79-5(g) and that they would bear the burden of having to demonstrate reasons to continue the seal beyond ten years.[9] Proponents now argue that their counsel's concessions in the Ninth Circuit cannot bind them as a judicial admission. Reply (Dkt. No. 900) at 4. Perhaps. But those concessions are a significant indication that even Proponents' counsel contemporaneously understood that sealing is typically limited in time and that it was not reasonable to rely solely on Judge Walker's statements to insist that sealing be permanent.

In my prior Order, I rejected the idea that Proponents' "judicial integrity" argument, defined as it is by the unique procedural and historical facts that led to the recordings' existence, could be a compelling justification requiring indefinite sealing of the trial recordings. Having found that the common law right of access requires release of the trial recordings absent some other evidence that could theoretically provide a compelling justification, and finding absolutely none presented on this record, Proponents' motion to continue the seal on the trial recordings is DENIED. On the undisputed record before me, there is no justification, much less a compelling one, to keep the trial recordings under seal any longer. The recordings shall become public on **August 12, 2020**.[10]

The Proponents ask me to stay the release of the recordings until either their appeal of the unsealing order is resolved by the Ninth Circuit (and perhaps the Supreme Court) or at least until

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[8] Indeed, plaintiffs asked Proponents' counsel for permission to contact three of the Proponents' trial witnesses to ask them if they had any concerns about unsealing the trial recordings. Declaration of Christopher D. Dusseault, ¶ 2. Dkt. No. 895-1. Proponents' counsel declined that permission, informing plaintiffs' counsel that he "polled a critical mass of our clients and witnesses" and none of them supported unsealing. *Id.* ¶ 3.

[9] *See* Oral Argument at 7:04–7:48, *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012) (No. 11-17255), https://bit.ly/35toPvJ.

[10] On the prior motion and again here, the sides disagree when the Judgment in this case was entered and, hence, when the default ten years will run. I addressed these arguments in my January 2018 Order and see no reason to deviate from the conclusion that the ten years runs on August 12, 2020.

movants can seek a stay from the Ninth Circuit. However, I wrote in my January 2018 Order and reiterated at the June 17, 2020 hearing on the current motion that the release of the recordings would occur on August 12, 2020 in light of Proponents' failure to identify any compelling justification other than the time-limited one of judicial integrity. The Proponents, who appealed the January 2018 Order, are in a position to swiftly to seek a stay of the release from the Ninth Circuit. Absent a stay from the Ninth Circuit, on August 12, 2020, the Clerk's Office will prepare to release the recordings to the public.[11]

IT IS SO ORDERED.

Dated: July 9, 2020

William H. Orrick
United States District Judge

United States District Court
Northern District of California

[11] The actual mechanics of the public release of the recordings is still under consideration. A further Order describing the mechanics of that release will be issued prior to August 12, 2020.

EXHIBIT 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. 09-cv-02292-JW (WHO)

ORDER ON MOTION TO UNSEAL VIDEOTAPED TRIAL RECORDS

Re: Dkt. Nos. 852, 863

This motion presents a conundrum: our District has possession of an undeniably important historical record — video recordings of the high profile bench trial to determine the constitutionality of California's Proposition 8, colloquially known as the ban on same-sex marriage. But the recordings were explicitly made for personal use by the presiding judge at the trial, the Hon. Vaughn Walker, in preparing findings of fact. When he began using them in public appearances, the Ninth Circuit stopped him, citing the "importance of preserving the integrity of the judicial system." It left open the question of whether they could be released in the future, or when.

Media intervenor KQED, Inc. now asks me to unseal those video recordings.[1] KQED's unsealing request is supported by the plaintiffs in the action[2] and the plaintiff-intervenor City and County of San Francisco (CCSF). Dkt. Nos. 866, 867.[3] Defendant State of California does not oppose the motion to unseal. Dkt. No. 869. The unsealing request is opposed by the defendant-

[1] This matter came to me as Duty Judge, given Judge Walker's retirement from the bench.

[2] Plaintiffs are Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo.

[3] Proposed Amicus American Civil Liberties Union of Northern California (ACLU) also supports the motion to unseal. Dkt. No. 863. The ACLU's motion for leave to file their amicus brief is GRANTED. I will refer to KQED, plaintiffs, CCSF, and the ACLU as "movants" herein.

intervenors (Proponents).[4] With scant guidance, I refer to our Civil Local Rule 79-5, also cited by the Ninth Circuit, to order that the recordings be kept under seal for a total of ten years from the trial court's order entering judgment, or until August 12, 2020, unless the Proponents, by that time, show compelling reasons for the seal to remain in place for an additional period of time. I DENY the motion to unseal at this juncture.

BACKGROUND

In the weeks leading up to the January 2010 bench trial, Judge Walker "expressed a desire to satisfy the public's interest in the case by broadcasting a video feed of the proceedings to various federal courthouses and online" and designated the trial for inclusion in the Northern District's pilot program for broadcasting court proceedings. *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012).[5] On the morning of the first day of trial, the Supreme Court (at the request of Proponents) issued a temporary stay of the broadcast. *Hollingsworth v. Perry*, 558 U.S. 1107 (2010) (mem.). Two days later, the Court entered a further stay pending the filing of a petition for mandamus or certiorari, finding that "the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting." *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (per curiam).[6]

Judge Walker recorded the first two days of trial, because the Supreme Court might have decided to lift the temporary stay issued on the first day of trial. After the further stay came into

[4] The Proponents are Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson.

[5] The procedural background is largely taken from the Ninth Circuit's recitation in *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012). None of the parties or movants on this motion dispute the procedural facts as described by the Ninth Circuit.

[6] At issue was the Ninth Circuit's adoption in late 2009 of a pilot program to allow recording and broadcasting, and the Northern District's revision of its Civil Local Rule to allow participation in that new pilot program. As a result of the Supreme Court's stay, the applicable Civil Local Rule in effect at the time of trial, Civ. L. R. 77-3, prohibited recording and broadcasting of court proceedings, "[u]nless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge." *Perry v. Brown*, 667 F.3d at 1082 n. 1.

effect, the Proponents asked that the recording be stopped. As recited by the Ninth Circuit:

> It was in this context that Judge Walker responded as follows:
>
> > The local rule permits the recording for purposes ... of use in chambers.... And I think it would be quite helpful to me in preparing the findings of fact to have that recording. So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.
>
> Proponents dropped their objection at that point.

Perry v. Brown, 667 F.3d at 1082.[7]

In May 2010, Judge Walker offered to make copies of the video recordings available to any party that intended to use excerpts during their closing arguments. That offer was made contingent on the recipient maintaining the recordings under "a strict protective order." Plaintiffs and CCSF obtained copies. After closing arguments, Proponents moved to require the return of the copies. *Perry v. Brown*, 667 F.3d at 1082. In an August 4, 2010 Order, Judge Walker held:

> The trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record. The parties may retain their copies of the trial recording pursuant to the terms of the protective order herein. Proponents' motion to order the copies' return [] is accordingly DENIED.

Perry v. Schwarzenegger, 704 F.Supp.2d 921, 929 (N.D.Cal. 2010).[8]

The Proponents appealed Judge Walker's judgment striking down Proposition 8; they did

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[7] As the Ninth Circuit recognized, Proponents did subsequently file a petition for a writ of certiorari in April 2010, seeking to vacate the Ninth Circuit's denial of Proponents' petition for a writ of mandamus to prevent Judge Walker from "broadcasting the trial." *See* Petition for a Writ of Certiorari, *Hollingsworth v. U.S. Dist. Court for Northern Dist. of California*, —— U.S. ——, 131 S.Ct. 372, 178 L.Ed.2d 1 (2010) (No. 09–1238), 2010 WL 1513093. The Supreme Court ultimately granted certiorari and remanded with instructions to dismiss the petition for a writ of mandamus as moot because the trial was over and had not been "broadcasted." *Hollingsworth v. U.S. Dist. Court for Northern Dist. of California*, —— U.S. ——, 131 S.Ct. 372, 178 L.Ed.2d 1 (2010) (mem.).

[8] As noted by the Ninth Circuit, Judge Walker recognized in his opinion that the Proponents' designated witnesses had expressed concerns about testifying in light of the potential for the broadcast of the proceedings. Judge Walker discounted that concern, weighing it against the Proponents because "proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated." *Perry v. Schwarzenegger*, 704 F.Supp.2d at 929.

not challenge either the denial of their motion to compel the return of the copies or the district court's entry of the recording in the record. *Perry v. Brown*, 667 F.3d at 1083.

In 2011, Judge Walker retired. Both before and after that retirement, Judge Walker "displayed" excerpts from the video recordings during public appearances. *Id*. The Proponents once again returned to court, asking the Ninth Circuit to order Judge Walker to return the video recordings to the Court's possession. The plaintiffs filed a cross-motion to unseal the recordings.[9] The Ninth Circuit referred the matters back to the District Court.

The Hon. James Ware denied Proponents' motion to order Judge Walker to return the videos to the possession of the Court (although Judge Walker had returned them in the interim), and granted plaintiffs' cross-motion to unseal. *Perry v. Schwarzenegger*, No. C 09–02292 JW, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011).[10] Judge Ware concluded that the common-law right of public access applied to the recordings, that neither the Supreme Court's decision in *Hollingsworth* nor the local rule governing audiovisual recordings barred their release, and that Proponents had made no showing sufficient to justify continued sealing in the face of the common-law right. *Id*. at *3–6. Judge Ware also directed that a copy of the recordings be returned to former Judge Walker. *Id*. at *6. Proponents immediately appealed that ruling.[11]

The Ninth Circuit reversed. The court initially assumed "for purposes of this case only, that the common-law presumption of public access applies to the recording at issue here and that it is not abrogated by the local rule in question." *Perry v. Brown*, 667 F.3d at 1084. The court then concluded that there was "a compelling reason in this case for overriding the common-law right" of access, namely "Proponents reasonably relied on Chief Judge Walker's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast

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[9] A "Media Coalition," including KQED, moved to intervene at the Ninth Circuit in order to support plaintiffs' cross-motion to unseal. *Perry v. Brown*, Ninth Cir. Case No. 10-16696, Dkt. No. 343.

[10] The Media Coalition appeared at the August 29, 2011 hearing before Judge Ware on the cross-motion to unseal. Dkt. No. 810.

[11] The Media Coalition successfully intervened back at the Ninth Circuit in support of Judge Ware's order unsealing the video recordings. *Perry v. Brown*, Ninth Cir. Case No. 11-17255, Dkt. Nos. 6-1, 15, 28-1.

to the public, at least in the foreseeable future." *Id.*, 667 F.3d at 1084–1085.

The Ninth Circuit determined that Judge Walker made "at least two" "unequivocal assurances that the video recording at issue would not be accessible to the public." *Id.* at 1085. Those assurances were, in essence, a commitment by Judge Walker not to allow the public broadcasting of the videos. In the absence of those assurances, and given the indications provided in the Supreme Court orders, the Ninth Circuit concluded the "Proponents again might well have taken action to ensure that the recording would not be made available for public viewing." *Perry v. Brown*, 667 F.3d at 1085-86.

In light of those assurances and the "importance of preserving the integrity of the judicial system" the Ninth Circuit found a compelling reason for the continued sealing of the recordings. *Id.* at 1087-88. In reaching its decision, however, the Ninth Circuit was careful to avoid concluding that the then-existing compelling reason and the Proponents' reasonable expectations regarding non-broadcast would permanently preclude disclosure. The court explained that proponents reasonably relied on assurances that the video recordings would not be broadcast in public "at least in the foreseeable future." *Id.* at 1084-85. That "foreseeable future" according to the court was informed by the Northern District's Civil Local Rule providing that documents filed under seal in a civil case "shall be open to public inspection without further action by the Court 10 years from the date the case is closed" unless "a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule." *Id.* at 1084-85 n.5.

KQED now moves to unseal again, arguing that the Supreme Court's decision affirming Judge Walker's determination that Proposition 8 was unconstitutional (*Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (*Hollingsworth II*)), the passage of time, and the wider-acceptance of same-sex marriage has lessened both the justifications for the sealing and the reasonable expectations of the Proponents for continued sealing of the indisputably historically significant video recordings.

Each of the named plaintiffs who testified during the bench trial submits a declaration in

support of unsealing. Dkt. Nos. 857, 858, 859, 860. The plaintiffs explain why they believe public release and review of the video recordings is important and why the currently-available transcripts are not an adequate substitute. The plaintiffs expect that the video recordings will carry significant and unique weight in showing what happened during the trial because they show the vulnerability of the plaintiffs as they testified and the level of emotion surrounding their testimony, "uniquely show[ing] the real reasons that marriage is important to people like" the plaintiffs. Stier Declaration [Dkt. No. 859] ¶¶ 7, 8; *see also* Zarrillo Decl. [Dkt. No. 860] ¶ 6 ("People should be able to see what I experienced, where I had to literally testify and prove that I love Paul.").

KQED also submits declarations from directors at two non-profits involved in advocacy and education on lesbian, gay, bisexual and transgender (LGBT) issues. Dkt. Nos. 855, 856. One director testifies that release of the video recordings will further "the public's ongoing desire to understand the profound social and legal issues that were publicly tried in this Court and ultimately affirmed by the U.S. Supreme Court." Levy Decl. [Dkt. No. 856], ¶ 4. The other director states that release of the video recordings "will meaningfully contribute to the public's understanding of the evidence that was presented by the parties during this contested federal trial, evidence that continues to have relevance and resonance today." Kendell Decl. [Dkt. No. 855], ¶ 4. Finally, KQED submits the declaration of its Senior Editor, California Politics & Government, Scott Shafer. Dkt. No. 854. According to Shafer, the initial KQED and other media coverage of the trial could only summarize what happened in the court each day, and public access to the full and "actual trial recording is critical [] understanding how this critical chapter in California legal history unfolded." Shafer Decl. ¶ 5. Shafer explains that KQED would use the video recordings as teaching tools and to produce a statewide radio special. *Id.* ¶ 6.[12]

LEGAL STANDARD

"The law recognizes two qualified rights of access to judicial proceedings and records," a

[12] The Proponents did not submit a declaration or other evidence in support of their opposition to the motion to unseal.

First Amendment right of access to criminal proceedings and a common-law right of access to inspect and copy judicial records and documents. *United States v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1195 (9th Cir. 2011). The Ninth Circuit has not squarely addressed which standard applies to access to civil proceedings as opposed to access to civil judicial records and documents.[13]

Under the common-law right of access, "[f]ollowing the Supreme Court's lead, 'we start with a strong presumption in favor of access to court records.'" *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.2003)). Accordingly, "[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the 'compelling reasons' standard." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.2006). Under this stringent standard, a court may seal records only when it finds "a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture." *Kamakana*, 447 F.3d at 1179. The court must then "conscientiously balance[ ] the competing interests of the public and the party who seeks to keep certain judicial records secret." *Id.*

Under the qualified First Amendment right of access, courts "must consider whether '(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.'" *Perry v. Brown*, 667 F.3d at 1088 (quoting *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1466 (9th Cir.1990)). To determine whether a First Amendment right of access exists to particular proceedings or documents, courts apply the two part "experience and logic" test, asking: (1) "whether the place

[13] KQED argues the Ninth Circuit confirmed that the First Amendment right of access applies to civil proceedings in *Courthouse News Service v. Planet*, 750 F.3d 776, 793 (9th Cir. 2014). The question before that panel, however, was whether First Amendment and free speech issues were significantly implicated to reverse the district court's decision to abstain from deciding what rights of access a media outlet should have to complaints filed in superior court. The court expressly took "no position on the ultimate merits" of the claim, but in light of the significant First Amendment issues involved remanded for the district court to consider the merits of the claim in the first instance. *Id.* *Courthouse News* did not explicitly settle the question of which standard is applied to justify sealing (or closing) civil proceedings and records of those proceedings.

and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *See United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017) (quoting *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986)). "Even when the experience and logic test is satisfied, however, the public's First Amendment right of access establishes only a strong presumption of openness, and 'the public still can be denied access if closure 'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Times Mirror Co. v. United States*, 873 F.2d 1210, 1211 n.1 (9th Cir. 1989) (quoting *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 509–10 (1984)).

The First Amendment is "generally understood to provide a stronger right of access than the common law." *Custer Battlefield*, 658 F.3d at 1197 n.7. However, as noted above, both the qualified First Amendment and common-law right of access standards require a showing of compelling justifications for the sealing of court proceedings and documents.

At the time of the Proposition 8 bench trial and the February 2012 decision by the Ninth Circuit in *Perry v. Brown*, Northern District Civil Local Rule 79-5(f) "provided that '[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed,' with the proviso that 'a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule.'" *Perry v. Brown*, 667 F.3d at 1085 n.5.[14]

DISCUSSION

KQED, the plaintiffs, CCSF, and the ACLU argue that release of the video recordings is warranted now. They point out that Judge Walker's ruling is settled law following its affirmance

[14] The current version, Civ. L.R. 79-5(g), provides in full: "Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a Submitting Party or a Designating Party may, upon showing good cause at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts."

by the Supreme Court. They note that in its 2012 decision on the appeal from the first motion to unseal, the Ninth Circuit relied in part on the fact that merits of the case had not yet been decided and the law on same-sex marriage remained unsettled, and held only that the video recordings had to remain under seal at that time and not in perpetuity. They also show that while there has been wider acceptance of same-sex marriage (certainly as a legal matter), there is continued, ongoing debate over the issue and a continued interest in the Proposition 8 trial itself.

Given the changed circumstances from the time when the Ninth Circuit ruled on sealing in 2012 and the significant continued public interest, movants argue that the compelling justifications found by the Ninth Circuit in 2012 no longer exist and the public's right of access – both under the common law and the First Amendment – requires the video recordings to be unsealed. Movants also argue that any interests the Proponents may have had regarding potential harassment due to their involvement in the trial that could have supported continued sealing in 2012 have been mitigated by the passage of time, the now-settled legality of same-sex marriage, and the extensive reporting that occurred during and following the trial (including re-enactments) that disclosed Proponents' actual arguments and testimony but which did not result in any actual harassment shown by evidence in the record.[15] Finally, movants contend thatthe Northern District's Local Rule presumptively sealing court records for ten years, Civ. L.R. 79-5(g), must give way to the public's right of access given the lack of existing compelling justifications and the arbitrary ten year outer boundary used in that Rule.[16]

Proponents make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them. Indeed, the transcript of the trial has been widely disseminated and dramatized in plays and television shows. Instead, they raise a number of arguments that I am both barred from considering movants' request to unseal and, if I reach the merits, required to continue the seal.

---

[15] Movants also note that one of the two witnesses for the Proponents subsequently and publicly reversed his position on same-sex marriage. Mot. at 11-12 n.8.

[16] KQED points out that the Eastern District of Pennsylvania provides for the presumptive unsealing of records two years after the conclusion of a civil action and the Western District of North Carolina unseals records after final disposition of the case. Mot. at 18.

As an initial matter, I reject the arguments that I cannot consider the motion to unseal on its merits because of the Ninth Circuit's mandate on the prior motion to unseal or because of the doctrines of issue preclusion, law-of-the-case, or stare decisis. The Ninth Circuit's mandate reversed Judge Ware's decision, concluding he had abused his discretion, and remanded "with instructions to maintain the trial recording under seal." *Perry v. Brown*, 667 F.3d at 1088-89. That mandate did not include any language indicating that the materials should remain under seal in perpetuity or otherwise binding the district court from addressing a future motion to unseal based on changed circumstances. The language utilized by the Ninth Circuit was conditional as to time. The court expressly concluded that: "Proponents reasonably relied on Chief Judge Walker's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, *at least in the foreseeable future*" and cited the District's civil local rule providing a ten year presumptive mark for unsealing court records. *Id.*, 667 F.3d at 1084-85 (emphasis added).[17] The court's recognition that continued sealing is conditional squares with Ninth Circuit authority requiring proponents of sealing to show that justifications supporting continued sealing continue to exist. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1181 (9th Cir. 2006) (determining whether justifications existed to continue sealing court records).[18] Therefore, I am not bound or otherwise precluded from addressing this motion on its merits.

On the merits, I have no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches. But I conclude that the compelling justification of judicial integrity identified in the Ninth Circuit's

[17] I recognize that Judge Walker's assurances, relied on by the Ninth Circuit, could imply that the video recordings would never be accessible to the public. But the focus here is on whether Proponents could rest on those implied assurances indefinitely, and as recognized by the Ninth Circuit, they cannot.

[18] Nor is my consideration of this motion barred by the Supreme Court's decisions staying the broadcast of the trial. The Supreme Court did not address the question at hand, and expressly limited itself to whether "broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting." *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010).

2012 Order continues to apply and prevents disclosure of the video recordings through the presumptive unsealing ten year mark applicable under Civil Local Rule 79-5(g).

Proponents argue that former Local Rule 77-3, as well as long-standing judicial policies in place in 2010 preventing or tightly controlling the recording and broadcasting of court proceedings, defeat the public's right of access and preclude release of the video recordings for public dissemination. They rely on the Supreme Court's recognition that the Rule 77-3 had the "force of law" *Hollingsworth v. Perry*, 558 U.S. at 191, and argue that releasing the video recordings now would violate that law which at the time strictly prohibited the broadcast of proceedings outside of the Court. However, a recording of the proceedings *was made* and was, without separate objection by Proponents, made part of the trial record. As circumstances and justifications change (for example, the current Northern District and Ninth Circuit rules and policies *allow* for public broadcast of proceedings), so does the calculus concerning how the public's right of access weighs against asserted compelling justifications for maintaining court records under seal. Neither former Rule 77-3 nor the Judicial Conference or Ninth Circuit Judicial Council policies in effect in 2010 preclude the public's right of access from attaching to the video recordings.

Proponents also contend that the common-law right of access cannot apply to video recordings of witness testimony that are "wholly derivative of evidence offered and the arguments made in open court" relying on *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996). Oppo. at 18-19. *McDougal*, however, dealt with a markedly different situation and applied a different standard in assessing the public's right of access. There, the Eighth Circuit concluded that a videotaped deposition played in open court was not a "judicial record" to which the right of public access attaches and, in the alternative if considering the deposition tape to be a judicial record, declined to apply the accepted-in-other-circuits (including the Ninth) "strong presumption" of public access to judicial records. Here, unlike in *McDougal*, the video recordings at issue are recordings *of the court proceedings themselves*, not a prior recording of testimony simply played at trial. Those tapes were made with the express intent and actual purpose of assisting the trial judge in reaching his decision. Moreover, the analysis of *McDougal* is contrary to "the strong

presumption in favor of copying access" applicable in the Ninth Circuit to "audio and videotape exhibits as they are received in evidence during a criminal trial." *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1290, 1294 (9th Cir. 1986). The public's right of access applies to the video recordings at issue.

However, the compelling justification identified by the Ninth Circuit in 2012 – namely, judicial integrity – continues to exist and precludes release of the video recordings at this juncture. To be clear, I am not holding that the recordings must continue to be sealed simply because Judge Walker made a promise that movants argue was mistaken if not impermissible under the law. I agree that a record cannot continued to be sealed where a trial judge makes a mistake in characterizing the record at issue or the interests proffered to justify sealing. [19] I also agree that just because a compelling justification existed at one point in time does not mean that a compelling justification exists in perpetuity. As the Ninth Circuit has noted, in order for documents to remain under seal, there must be compelling "interests favoring *continued* secrecy." *Kamakana*, 447 F.3d at 1181 (emphasis added).

Here the compelling justification identified by the Ninth Circuit in 2012 continues to exist. That justification, judicial integrity, was and continues to be inextricably couched in the unique procedural facts recognized by both the Supreme Court and the Ninth Circuit in the appeals related to recordings at issue including: (i) the adoption of a pilot project to allow recording and broadcast of court proceedings in the Ninth Circuit (without prior public notice and comment), (ii) the efforts to modify this District's civil local rules (without prior public notice and comment), (iii) then-existing Civil Local Rules in effect at the time of the trial (given the Supreme Court's stay) that did not allow for recording or broadcast, (iv) the assurances of internal-only use made by Judge Walker which (as the Ninth Circuit concluded) were relied upon by Proponents in not seeking a further stay of the recording, and (v) the Ninth Circuit's reliance on this District's ten year presumption of continued sealing.

[19] Although there is no evidence that at the time Judge Walker made his assurances to the Proponents that he was mistaken on a matter of fact or law.

While I do not find my consideration of this motion to unseal is precluded by the Ninth Circuit's decision in *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012) – because circumstances change and justifications become more or less compelling – I do find that the compelling reason of judicial integrity identified by *that court* continues to require sealing of the video recordings, at least until the rules of *this court* setting the presumptive unsealing of record after ten years apply.[20]

Proponents argue that the ten year unsealing presumption in former Local Rule 79-5(g) cannot set their reasonable expectations as to whether and when the video recordings might be released because that Rule only applies to records created by the parties and not records of judicial proceedings created by the Court. However, Rule 79 applied generally to "BOOKS AND RECORDS KEPT BY THE CLERK," Rule 79-5 applied to "Filing Documents Under Seal," and then-Rule 79-5(f) provided in full:

> (f) Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records destruction policy of the United States Courts. The chambers copy of sealed documents will be disposed of in accordance with the assigned Judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made.

Civil Local Rule 79 (in effect in 2010 <https://cand.uscourts.gov/superseded-local-rules>).[21]

That Rule 79-5 contained procedures in some of its subdivisions governing how parties could file materials under seal and that 79-5(f) provided that any party who did so may move to

[20] I recognize there is some dispute over when that ten year mark will occur, given that judgment in the case was not (apparently due to an oversight) entered in August 2010 as Judge Walker instructed. However, given the intent of the trial court and the subsequent appeal on its merits, August 12, 2010 is functionally the date the case was "closed" for substantive proceedings on the merits.

[21] A similar rule currently exists as Civil Local Rule 79-5(g).

continue the seal after the ten year presumptive period expires, does not mean that the presumptive unsealing rule is somehow limited. There was and is nothing in Rule 79-5 limiting the presumptive unsealing to materials filed by the parties as opposed to materials created and filed by the Court, like transcripts of judicial proceedings or the video recordings at issue. Judge Walker, as noted above, directed that the Clerk "file the trial recording under seal as part of the record." *Perry v. Schwarzenegger*, 704 F.Supp.2d at 929. Rule 79-5 applies. Moreover, there is no inherent conflict between then-existing Rule 79-5(f) presumptive unsealing and then-existing Rule 77-3 prohibition on recording and broadcasting proceedings. Nothing in the Rules themselves creates an inherent conflict.

Movants' argument both relies on then-Rule 79-5(f) and then seeks to avoid it. Movants first argue that the ten year presumption of unsealing, as cited by the Ninth Circuit, would set the outside boundary of Proponents' reasonable expectation of sealing. Reply at 4. They also argue, however, that ten years is an arbitrary timeframe, adopted without apparent case law or other support, and that timeframe cannot be used to defeat the public right of access to the video recordings *now* on the facts currently presented. Mot. at 18. However, as noted above, the existence of the ten year unsealing presumption was significant to the Ninth Circuit and remains significant to me.

Finally, my analysis would be no different if I applied a First Amendment right of access instead of the common-law right of access. As noted above, compelling justifications must exist to satisfy both standards. The fact that the First Amendment standard might be harder to satisfy, did not preclude the Ninth Circuit from finding it satisfied in 2012. *Perry v. Brown*, 667 F.3d at 1088. The same holds true here.

CONCLUSION

The resolution of KQED's motion to unseal is properly before me on its merits. I conclude that the common-law right of access applies to the video recordings made by and for the use of Judge Walker but that the compelling justification of judicial integrity – given the unique facts of this case and legal decisions weighing on the legality of Judge Walker's efforts to create those recordings – still precludes their release at this juncture.

I further rule that the recordings shall be released to movants on August 12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them. Proponents shall file any motion to continue the sealing no later than April 1, 2020, any opposition is due on May 13, 2020, and the reply on May 27, 2020. The hearing, if one is needed, is set for June 17, 2020.

IT IS SO ORDERED.

Dated: January 17, 2018

William H. Orrick
United States District Judge

EXHIBIT 3

Volume 4

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Thursday January 14, 2010

TRANSCRIPT OF PROCEEDINGS

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_ _ _ _

P R O C E E D I N G S

JANUARY 14, 2010 **8:42 A.M.**

THE COURT: Very well. Good morning, Counsel.

(Counsel greet the Court.)

THE COURT: Let's see. First order of business, I have communicated to judge -- Chief Judge Kozinski, in light of the Supreme Court's decision yesterday, that I'm requesting that this case be withdrawn from the Ninth Circuit pilot project. And he indicated that he would approve that request. And so that should take care of the broadcasting matter.

And we have motions that have been filed on behalf of Mr. Garlow and Mr. McPherson. And the clerk informs me counsel for those parties are here present.

MR. MCCARTHY: Correct, Your Honor.

THE COURT: All right. Fine.

MR. MCCARTHY: Vincent McCarthy, Your Honor. I was admitted pro hac vice into this court very recently.

THE COURT: Yes. I believe I signed that yesterday, or the day before.

MR. MCCARTHY: I understand.

THE COURT: Well, welcome.

MR. MCCARTHY: Thank you.

THE COURT: You've got quite a lineup of lawyers here.

Q. Okay.

MR. PATTERSON: Your Honor, I would like to request a brief break, if I may?

THE COURT: How much longer do you have with this witness?

MR. PATTERSON: I would say I'm about halfway through, your Honor.

THE COURT: Okay. Maybe a break, like your colleague Mr. Thompson, will reduce the length somewhat.

MR. PATTERSON: Okay.

THE COURT: That I'm sure will be helpful to everybody.

All right. Shall we take until 15 minutes of the hour, or 10:45.

MR. COOPER: Your Honor, just before we break, may I ask one minor housekeeping matter?

THE COURT: Yes.

MR. COOPER: Point of clarification, actually, and it's further to your announcement as we opened the court day, that the Court was asking for withdrawal of this case from the pilot program.

I just ask the Court for clarification, if I may then understand that the recording of these proceedings has been halted, the tape recording itself?

THE COURT: No, that has not been altered.

MR. COOPER: As the Court knows, I'm sure, we have put in a letter to the Court asking that the recording of the proceedings be halted.

I do believe that in the light of the stay, that the court's local rule would prohibit continued tape recording of the proceedings.

THE COURT: I don't believe so. I read your letter. It does not quote the local rule.

The local rule permits remote -- perhaps if we get the local rule --

MR. BOUTROUS: Your Honor, I have a copy.

THE COURT: Oh, there we go.

(Whereupon, document was tendered to the Court.)

THE COURT: The local rule permits the recording for purposes the -- of taking the recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms. And I think it would be quite helpful to me in preparing the findings of fact to have that recording.

So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

And you will notice the local rules states that:

"The taking of photographs, public

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as registrar-recorder/county clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party. Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc #425. Any party wishing to make use of the video during closing arguments is DIRECTED to inform the court clerk not later than June 2, 2010 at 5 PM PDT.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

EXHIBIT 5

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs, VS. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants.	NO. C 09-2292-VRW San Francisco, California Wednesday June 16, 2010

TRANSCRIPT OF PROCEEDINGS

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With the Court's permission today, during closings Mr. Olson will be playing some of the video clips from the trial proceedings. We propose, if this works for the Court, that at the end of the day we would offer the transcript pages for the record, whenever it's convenient for the Court, rather than doing it for the closings. Then we'll have that for the record.

THE COURT: That would seem to make sense. Does it not, Mr. Cooper?

MR. COOPER: I'm sorry, Your Honor. I'm not sure I followed the proposal.

THE COURT: Maybe you can clarify.

MR. BOUTROUS: I can clarify.

We will be playing video clips from the trial proceedings during the closing arguments. At the end of the day, or whenever it is convenient for the Court, we would offer into the record the transcript pages of the clips that we have played in court, marked as exhibits for the record.

MR. COOPER: I understand. And I see no objection to that, Your Honor.

THE COURT: Fine. That will be fine.

MR. BOUTROUS: Thank you.

THE COURT: Any other housekeeping? Good. Mr. Olson.

So there's four different categories. If you reduced it to three, yes, it would be less capricious and less arbitrary. But it wouldn't make it constitutional.

THE COURT: And why not?

MR. OLSON: It would not make it constitutional because there is not a compelling governmental interest to put the plaintiffs in a class like this and take away what the Supreme Court has called a fundamental right, a right of liberty, privacy, association, intimacy and autonomy. You are taking away, the state is, that fundamental right.

And even if we did -- and if it was intermediate scrutiny, you can't rely -- in the *VMI* case, for example, *United States vs. Virginia*, the Supreme Court said, you can't make this up after the fact. The post-talk rationalizations won't work.

One of the reasons I explained to you the shift in position is to show you that the rationalizations that were being offered at the end of the trial were different than the motives that were in the ballot proposition and the advertising.

These have become post hoc rationalizations because the proponents don't want to come in here and say we passed -- or the people passed Proposition 8 because they don't -- they think gays are unusual. They don't want our children to know about them.

That sounds awful lot like animus. So the rationalization now is procreation and something called the deinstitutionalization of marriage. Whatever in the world that is.

I think it's really important, given what the Supreme Court has said about marriage and what the proponents said about marriage, to hear what the plaintiffs have said about marriage and what it means to them, in their own words.

They have said that marriage means -- and this means not a domestic partnership. This means marriage, the social institution of marriage that is so valuable that the Supreme Court says it's the most important relation in life.

The plaintiffs have said that marriage means to them freedom, pride. These are their words. Dignity. Belonging. Respect. Equality. Permanence. Acceptance. Security. Honor. Dedication. And a public commitment to the world.

One of the plaintiffs said, "It's the most important decision you make as an adult." Who could disagree with that?

I would like, with Your Honor's permission now, to play a couple of excerpts from the testimony by the four plaintiffs, starting with Plaintiffs Katami and Zarrillo, explaining why they want to marry, because they can say it better than I can.

This is, first of all, Plaintiff Katami, followed by Plaintiff Zarrillo.

What do we have to do? Okay. Thank you.

(Video played in open court.)

MR. OLSON: And now Plaintiff Kristin Perry.

(Video played in open court.)

MR. OLSON: And Plaintiff Sandra Stier.

(Video played in open court.)

MR. OLSON: If we had the time, Your Honor, I could not present a more compelling closing argument than simply replaying the testimony in its entirety than the four plaintiffs and Helen Zia.

They have described from their hearts what marriage means to them, what it does to them and says about them to be denied that right. If we did nothing else in this trial, that would be enough.

And the two plaintiffs, Perry and Stier, are in a domestic partnership relationship, you will recall during the trial. It isn't the same thing.

But we have so much more. There were eight experts, persons who have studied and written about American history, marriage, psychology, sociology, economics and political science throughout their entire professional lives.

I have the time to discuss just a segment of what they had to say, but their evidence was remarkably powerful, persuasive, and very consistent.

Professor Cott, for example, explained that contrary

to proponents' assertion, marriage is not primarily a vehicle by which the state promotes procreation.

She's an expert in marriage. She testified that its core social meaning, marriage, is a couple's choice to live with one another, to remain committed to one another, and to form a household based on feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life.

She said it is an aspect of liberty, basic civil right. The ability to marry is the expression of one's freedom. Those are the same things coming from the expert on marriage that the Supreme Court has been saying for 122 years.

And contrary to proponents' assertions, racial restrictions have, indeed, been a definitional feature of marriage. For example, as we learned from her, slaves were not permitted to marry until the Emancipation Proclamation.

And she testified -- and I would like to play that excerpt, if we can do the same mechanical things, to have her testify what it meant to the slaves.

(Video played in open court.)

MR. OLSON: What a powerful statement that slave made. "The marriage covenant is the foundation of all of our rights. It exemplified freedom." He could say "I do" to his partner.

Then Professor Cott explained the meaning and

EXHIBIT 6

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* Admitted *pro hac vice*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S MOTION FOR ADMINISTRATIVE RELIEF

official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that pursuant to Civ. L.R. 7-11, Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com ("Proponents") hereby move the Court for an order requiring Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession.

BACKGROUND

On January 13, 2010, the Supreme Court stayed this Court's order that the trial proceedings in this case be recorded and broadcast beyond the San Francisco federal courthouse. *Hollingsworth v. Perry*, 130 S. Ct. 705, 714-15 (2010). The stay remains in effect. *Id.*

In court the next day, Proponents asked "for clarification … that the recording of these proceedings has been halted, the tape recording itself." Trial Tr. 753. When the Court responded that the recording had "*not* been altered," Proponents reiterated that, "in light of the stay, … the court's local rule … prohibit[s] continued tape recording of the proceedings." *Id.* at 753-54 (emphasis added). Rejecting Proponents' objection, the Court stated that the "local rule permits … recording for purposes of *use in chambers* and that is customarily done when we have these remote courtrooms or the overflow courtrooms." *Id.* (emphasis added). The Court concluded, "that's the purpose for which the recording is going to be made going forward." *Id.*

On May 31, the Court *sua sponte* announced: "In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." Doc #672 at 2. Plaintiffs and Plaintiff-Intervenor each requested and obtained copies of the trial video—the former requesting the entire video, the latter the testimony of certain witnesses. *See* Doc ##674, 675.

Closing arguments were held on June 16. Proponents thereafter requested Plaintiffs and Plaintiff-Intervenor promptly to return all copies of the trial video in their possession to the Court, but they denied the request. *See* Decl. or Peter A. Patterson in Support of Proponents' Motion for Administrative Relief.

ARGUMENT

Now that closing arguments are complete, the sole purpose identified by this Court for

disseminating copies of the trial video to Plaintiffs and Plaintiff-Intervenor—potential use at closing argument—has been satisfied. There is simply no legitimate justification for permitting Plaintiffs and Plaintiff-Intervenor to maintain possession of copies of the trial video.

What is more, in issuing its stay order, the Supreme Court held that "irreparable harm" would "likely result" from public broadcast of the trial. *Hollingsworth*, 130 S. Ct. at 712. The risk of such harm, of course, does not depend on the means by which a trial recording is made public. And even with this Court's requirement that all copies of the trial video be "maintain[ed] as strictly confidential," Doc #672 at 2, it cannot be denied that dissemination beyond the confines of the Court has increased the possibility of accidental public disclosure. In light of this possibility, we respectfully submit that there is no justification for this Court to permit Plaintiffs and Plaintiff-Intervenor to maintain copies of the trial recording.

CONCLUSION

For these reasons, Proponents request an order directing Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession.

Dated: June 29, 2010

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL

By: /s/Charles J. Cooper
Charles J. Cooper

EXHIBIT 7

VAUGHN R WALKER
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(415) 871-2888

April 14, 2011

Molly Dwyer, Clerk
United States Court Of Appeals
Ninth Circuit
95 7th Street
San Francisco, CA 94103

Dear Ms. Dwyer:

This responds to a motion filed on April 13, 2011, by appellants-defendant-intervenors in Perry v Schwarzenegger, No 10-16696. It should be presented to the panel considering the motion.

Over the last several months, I have on about a half dozen occasions given a lecture or talk on the subject of cameras in the courtroom. These presentations included slides and videos from actual trials and re-enactments of trials. These included the Scopes, Hauptmann, Estes, Simpson and Perry trials. The basic point of the presentations is that videos or films of actual trials are more interesting, informative, compelling and, of course, realistic than re-enactments or fictionalized accounts in portraying trial proceedings.

In preparing to leave the district court earlier this year, I began collecting judicial and personal papers. Most of these now are in digital format, so I asked the head of the court's automation unit to download these to an external disk drive. Because the videos of the Perry trial were used in connection with preparing the findings in that case, the videos were included in the judicial papers downloaded to the disk drive.

In the first several cameras in the courtroom lectures, I used a re-enactment of cross-examination from Perry. When given the disk containing the Perry videos as part of my judicial papers, I decided that in the presentation on February 18 at the University of Arizona it would be permissible and appropriate to use the actual cross-examination excerpt from Perry, instead of the re-enactment. I also used that same excerpt in a talk to a meeting of the Federal Bar Association in Riverside, California on March 8 and in a class I am

teaching at the University of California Berkeley School of Law. I am scheduled to give a similar talk at Gonzaga University Law School next week. The Perry excerpt is three minutes in length.

I should also note that the video of the entire Perry trial was made available to the parties in that case and portions were used in the closing arguments in the district court and made part of the record before the case went on appeal. If the court believes that my possession of the videos as part of my judicial papers is inappropriate, I shall, of course, abide by that or any other directive the court makes.

The Perry case involved a public trial. As Chief Justice Berger observed some years ago, "People in an open society do not demand infallibility in their institutions, but it is difficult for them to accept what they are prohibited from observing."

Respectfully submitted,

Vaughn R Walker /RJS

Vaughn R Walker

cc: All Counsel

EXHIBIT 8

NO. 10-16696

ARGUED DECEMBER 6, 2010
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS, & N.R. SMITH)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

APPELLANTS' MOTION FOR ORDER COMPELLING RETURN OF TRIAL RECORDINGS

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Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com (hereinafter, "Proponents") respectfully move the Court to order that former district judge Vaughn Walker cease further disclosures of the video recordings of the trial proceedings in this case, or any portion thereof, and that all copies of the trial recordings in the possession, custody, or control of any party to this case or of former judge Walker be returned promptly to the Court and held by the court clerk under seal.[1]

INTRODUCTION

On February 18, 2011, Judge Walker delivered a speech at the University of Arizona in which he played a portion of the video recording of the cross-examination of one of Proponents' expert witnesses in the trial of this case. The speech was video taped by C-SPAN, and it was subsequently broadcast on C-SPAN several times beginning on March 22. *See* http://www.c-spanvideo.org/program/Vaugh, "Details – Airing Details." The speech is available for viewing on C-SPAN's website. *See id.*

By publicly displaying the video recording of a portion of the trial testimony, Judge Walker (1) violated his own order placing the video recording of the trial under seal; (2) ignored the clear terms of the district court's Local Rule 77-

[1] Counsel for both Appellees oppose this motion. As indicated in the Certificate of Service, a copy of this motion has been served upon former judge Walker.

3, which prohibits the broadcast or other transmission of trial proceedings beyond "the confines of the courthouse"; (3) contravened the longstanding policies of the Judicial Conference of the United States and the Judicial Council of this Court prohibiting public broadcast of trial proceedings; and (4) defied the United States Supreme Court's prior decision in this case ruling that an earlier attempt by then-Chief Judge Walker to publicly broadcast the trial proceedings "complied neither with existing rules or policies nor the required procedures for amending them." *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010). Thus, Judge Walker "'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.'" *In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009) (Easterbrook, C.J.) (quoting 28 U.S.C. § 351(a)).

But even more regrettable, perhaps, than all of this is the fact that Judge Walker's use of the trial recording repudiated his own solemn commitment to Proponents in open court that, despite Proponents' objection, the trial was being video recorded "simply for [his] use in chambers," because it "would be quite helpful to [him] in preparing the findings of fact." Ex. 1 at 754:18-19, 755:4. In reliance on this assurance, Proponents took no action to prevent the recording of the trial. One of Proponents' expert witnesses also relied on this assurance, deciding to testify after then-Chief Judge Walker had made clear that the trial

recording would not be broadcast. Now a portion of his testimony has appeared on national television, and he regrets his decision to trust this assurance.

What's done is done. Judge Walker's speech, and C-SPAN's public dissemination of it, cannot be undone, and given that Judge Walker has recently retired from the federal bench, he cannot be disciplined. *See In re Charge of Judicial Misconduct*, 91 F.3d 90, 91 (9th Cir. Judicial Council 1996). But he can be ordered to cease further unlawful and improper disclosures of the trial recordings, or any portion thereof, and to return to this Court any copies of the trial recordings in his possession, custody, or control. We respectfully request that he be ordered to do so. We also request that Appellees be ordered to return their copies of the trial recordings, which were provided to them by then-Chief Judge Walker for their use in closing argument below and in the appeal to this Court. Putting aside that providing copies of the trial recordings to Appellees also violated Local Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, and then-Chief Judge Walker's assurances in open court, the purpose for which they were provided has now been fulfilled, and Appellees' continued possession of the recordings can no longer be justified.

STATEMENT

A. Policies and Rules Governing Broadcast of Trial Proceedings

"In 1996, the Judicial Conference of the United States adopted a policy

opposing the public broadcast of [trial] court proceedings." *Hollingsworth v. Perry*, 130 S. Ct. 705, 711 (2010); *see also* Ex. 2 at 54. This policy, which remains in place today, *see Hollingsworth*, 130 S. Ct. at 712, is rooted in "decades of experience and study" showing the potentially negative impact of broadcasting on trial proceedings. Ex. 3 at 1; *see also Hollingsworth*, 130 S. Ct. at 711-12; Ex. 4 at 46-47. Indeed, in July 2009 the Judicial Conference forcefully reiterated to Congress its conclusion that the "negative [e]ffects of cameras in trial court proceedings far outweigh any potential benefit." Ex. 3 at 1.

Also in 1996, the Ninth Circuit Judicial Council "voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in the courts." Ex. 5. The Council's policy thus provided: "The taking of photographs and radio and television coverage of court proceedings in the United States district courts is prohibited." *Id.* "[T]his policy [was] … binding on all courts within the Ninth Circuit." *Id.* Accordingly, the Northern District of California adopted Local Rule 77-3, which "prohibited the streaming of transmissions, or other broadcasting or televising, beyond 'the confines of the courthouse.'" *Hollingsworth*, 130 S. Ct. at 711 (quoting Local Rule 77-3); *see also id.* at 707 (Local Rule 77-3 "forbid[s] the broadcasting of trials outside the courthouse in which a trial takes place"); Ex. 6.

B. The District Court's Efforts to Broadcast the Trial Proceedings

Former judge Walker has made no secret of his strong disagreement with the rules and policies prohibiting the broadcast of trial proceedings. Indeed, his February 18 speech was entitled "Shooting the Messenger: How Cameras in the Courtroom Got a Bad Rap." *See* http://www.c-spanvideo.org/program/Vaugh. His advocacy was no less fervent from the bench in this case. His determined effort, while Chief Judge, to broadcast the trial of this case, and the unlawful procedural irregularities that it occasioned, are recounted in detail in the Supreme Court's stay opinion, which put a stop to that effort. *See Hollingsworth*, 130 S. Ct. at 708-09, 711-12, 714-15. It suffices to repeat the Supreme Court's conclusion: "The District Court here attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States. It did so to allow broadcasting of this high-profile trial without any considered standards or guidelines in place. … [T]he order in question complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 713.

The Supreme Court was especially concerned about the effect on witnesses. Noting the Judicial Conference's determination that broadcasting trial testimony could have an "intimidating effect … on some witnesses," even in routine, non-controversial cases, the Court concluded that this "high-profile," highly divisive "case is … not a good one for a pilot program." *Id*. at 712, 714-15. Indeed, the

Court emphasized that "[s]ome of [Proponents'] witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment." *Id*. at 713. Thus, because public broadcast could have a chilling effect on witnesses' testimony and their willingness "to cooperate in any future proceedings," the Supreme Court determined that "irreparable harm will likely result from the denial of the stay." *Id*. at 712-13.

C. The Supreme Court's Decision Prohibiting Broadcast

On the morning of Monday, January 11, 2010, just before commencement of the trial, the Supreme Court entered a temporary emergency stay, "order[ing] that [then-Chief Judge Walker's] order … permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which trial is to be held" and that "[a]ny additional order permitting broadcast of the proceedings is also stayed." *Hollingsworth v. Perry*, 130 S. Ct. 1132 (2010). The temporary stay on its face was set to expire on Wednesday, January 13, when the Court would enter a decision on Proponents' stay application. *Id*.

At the opening of trial later that morning, Appellees asked Chief Judge Walker to continue video recording the proceedings for the purpose of later public dissemination "in the event the stay is lifted" on January 13. Ex. 7 at 15:9. Chief Judge Walker accepted Appellees' proposal over Proponents' objection that recording the proceedings was not "consistent with the spirit of" the temporary

stay issued by the Supreme Court. *Id*. at 16:16.

Far from lifting the stay, on January 13, the Supreme Court instead "grant[ed] the application for a stay of the District Court's order of January 7, 2010, pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 130 S. Ct. at 715.

D. Chief Judge Walker's Creation of the Trial Recordings

During the trial proceedings later on January 13, Chief Judge Walker noted that the Supreme Court's "guidance" with respect to the issue of broadcasting the proceedings was "rather limited." Ex. 8 at 662:18-20. Early the next day, Proponents filed a letter with the district court "request[ing] that [Chief Judge Walker] halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made." Ex. 9 at 1. Proponents explained that, because of the Supreme Court's ruling on their stay application, the proceedings were governed by the unamended version of Local Rule 77-3, which "'banned the *recording* or broadcast of court proceedings.'" *Id*. at 2 (quoting and emphasizing *Hollingsworth*, 130 S. Ct. at 708).

A few hours later, Chief Judge Walker opened that day's proceedings by reporting that, "in light of the Supreme Court's decision yesterday, … [he was] requesting that this case be withdrawn from the Ninth Circuit pilot project." Ex. 1

at 674:7-10. Proponents then asked "for clarification … that the recording of these proceedings has been halted, the tape recording itself." *Id*. at 753:22-24. When Chief Judge Walker responded that the recording "ha[d] *not* been altered," Proponents reiterated their contention (made in their letter submitted earlier that morning) that, "in light of the stay, … the court's local rule … prohibit[s] continued tape recording of the proceedings." *Id*. at 753:25, 754:4-6 (emphasis added).

Rejecting Proponents' objection, Chief Judge Walker stated that the unamended "local rule permits … recording for purposes of use in chambers and that is customarily done when we have these remote courtrooms or the overflow courtrooms," and that that the recording "would be quite helpful to [him] in preparing the findings of fact." *Id*. at 754:15-19. Thus, Chief Judge Walker said that "*that's* the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." *Id*. at 754:21-23 (emphasis added). Chief Judge Walker then repeated his position that he was making the recordings only for limited, private use: after noting that "the [unamended] local rule[] [prohibits] '[t]he taking of photographs, public broadcasting or televising, or recording for those purposes,'" Chief Judge Walker stated: "So the recording is not being made for those purposes, but *simply for use in chambers*." *Id*. at 754:24-755:4 (emphasis added). In reliance on Chief Judge

Walker's assurances that he was recording the proceedings *solely* for his personal *use in chambers*, Proponents took no further action to prevent the recording.

On January 15, Chief Judge Walker "formally requested Chief Judge Kozinski to withdraw this case from the pilot project." Ex. 10 at 2. Chief Judge Kozinski promptly granted Chief Judge Walker's request and "rescinded" his January 8 order designating this case for the pilot program. Ex. 11.

The district court then withdrew the amendment to Local Rule 77-3 authorizing participation in the pilot program. *See* Ex. 12 (showing Local Rule 77-3 without amendment). Despite the Supreme Court's criticism that the amendment lacked "standards or guidelines," *Hollingsworth*, 130 S. Ct. at 713, the district court re-proposed its amendment to Local Rule 77-3 on February 4, 2010. Ex. 13. After a comment period, the renewed proposal to amend Local Rule 77-3 lay dormant until May 2010, when the district court – without any announcement or indication on its website – published a revised set of Local Rules, effective April 20, containing the amended Local Rule 77-3. *See* Ex. 14-16.

On January 27, trial was adjourned. Closing argument was then set for June 16, 2010. On May 18, 2010, the Media Coalition requested that Chief Judge Walker "formally ask Chief Judge Kozinski to again include this case in the pilot project approved by the Ninth Circuit Judicial Council on December 17, 2009, for the sole purpose of recording, broadcasting and webcasting" the closing argument

portion of the trial. Ex. 17. Proponents submitted a letter opposing the request, explaining that it would violate the stay entered by the Supreme Court. Ex. 18.

While the Media Coalition's request was pending, and although Chief Judge Walker had unequivocally assured Proponents that he was recording the proceedings solely for his own use in chambers, Chief Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments" and, to that end, made "a copy of the video … available to the part[ies]." Ex. 19. Chief Judge Walker added: "Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id*., which restricts "highly confidential" material to the parties' outside counsel and experts and to the Court and its personnel, Ex. 20 ¶ 7.3.

Appellees Perry *et al.* requested and were given a copy of the recording of the entire trial proceedings, *see* Ex. 21, portions of which they played during closing argument, *see* Ex. 22 at 2961. Appellee City and County of San Francisco requested and was given portions of the trial recording, *see* Ex. 23, but did not play them during closing argument. Chief Judge Walker denied the Media Coalition's request to "record[], broadcast[] and webcast[] closing arguments." *See* Ex. 24.

On June 29, 2010, after closing argument, Proponents asked Appellees to return all copies of the trial recordings in their possession to the district court. Ex. 25 ¶ 2. When they refused, Proponents asked Chief Judge Walker to "order …

[Appellees] to return to the Court immediately all copies of the trial video in their possession." Ex. 26 at 1. Proponents argued that there was "no legitimate justification for permitting Plaintiffs and [San Francisco] to maintain possession of copies of the trial video" given that "the sole purpose identified by [Chief Judge Walker] for disseminating copies of the trial video to [them] – potential use at closing argument – ha[d] been satisfied." *Id*. at 1-2. Proponents added: "[E]ven with [Chief Judge Walker's] requirement that all copies of the trial video be 'maintain[ed] as strictly confidential,' it cannot be denied that dissemination beyond the confines of the Court has increased the possibility of accidental public disclosure," and thus of the "'irreparable harm'" that the Supreme Court acknowledged would "'likely result' from public broadcast of the trial." *Id*. at 2 (quoting *Hollingsworth*, 130 S. Ct. at 712). Appellees countered "that once judgment is entered, the parties and the Court [should] evaluate whether, and to what degree, the trial recording would be useful to the parties or to the Court in connection with any additional proceedings and/or appeal." Ex. 27 at 1.

On August 4, 2010, Chief Judge Walker denied Proponents' motion to order the return of all copies of the trial recordings. Ex. 28 at 5. Instead, he "DIRECTED" the district court clerk "to file the trial recording under seal as part of the record," and permitted Appellees to "retain their copies of the trial recording pursuant to the terms of the protective order." *Id*. at 4. After Proponents then

appealed Chief Judge Walker's final judgment, the district court clerk transmitted the certified record to this Court on October 22, 2010. Since then, the trial recordings have remained continuously under seal.

In the meantime, on April 8, 2010, Proponents petitioned the Supreme Court to grant review of this Court's earlier ruling denying their mandamus petition seeking to prohibit the district court from broadcasting or otherwise disseminating the trial proceedings. Proponents argued that, in light of Chief Judge Walker's withdrawal of his stayed broadcast order and his "unequivocal[] assur[ances] that [his] continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for [his] use in chambers," this Court's order denying the mandamus petition should be vacated as moot. Ex. 29 at 11-13. Appellees opposed vacatur of this Court's order. On October 4, 2010, the Supreme Court granted the petition, vacated this Court's mandamus ruling, and "remanded to [this Court] with instructions to dismiss the case as moot," Ex. 30, which this Court did on October 15, 2010, Ex. 31.

E. Judge Walker's Unlawful Public Disclosure of the Trial Recordings Beyond the Confines of the Courthouse

On February 18, 2011, Judge Walker, having stepped down as Chief at the end of December 2010, gave his speech at the University of Arizona. *See* http://www.c-spanvideo.org/program/Vaugh. A substantial portion of the speech, in which Judge Walker advocated allowing trial proceedings to be broadcast,

concerned this case. *See id*., video at 4:40-8:08, 30:49-42:00. At one point, Judge Walker played for his audience, on a large projection screen, an excerpt from the trial recording of the cross-examination of one of Proponents' expert witnesses. *See id*., video at 33:12-36:52. Ten days later, on February 28, 2011, Judge Walker retired from the bench. Ex. 32.

At least four times in late March 2011, C-SPAN broadcast Judge Walker's Arizona speech, including the playback of the trial proceedings. *See* http://www.c-spanvideo.org/program/Vaugh. In fact, Proponents' counsel learned of Judge Walker's speech – and of the fact that he publicly showed a portion of the trial recordings during the speech – as a result of one of those broadcasts. C-SPAN also made its broadcast of Judge Walker's speech available for public viewing on its website. *See* http://www.c-spanvideo.org/program/Vaugh.

ARGUMENT

I. THE TRIAL RECORDINGS MAY NOT BE SHOWN BEYOND THE CONFINES OF THE NORTHERN DISTRICT OF CALIFORNIA COURTHOUSE

The video recordings of the trial in this case may not lawfully be shown publicly beyond the confines of the Northern District of California courthouse. The trial recordings remain under seal; then-Chief Judge Walker's unequivocal assurances that the trial recordings were only for his use in chambers remain on the record; the Supreme Court's decision in this case – if not its stay, which might well still be in force but for those assurances – and the duly enacted rules of the Judicial

Council and the district court remain binding and plainly bar public dissemination of the trial recordings beyond the confines of the courthouse; and the considered judgment of the Judicial Conference of the United States continues to strongly counsel against public dissemination of the trial recordings.

The trial recordings were not the personal property of Judge Walker, for him to use as he pleased; he had access to them only by virtue of his role as the judicial officer presiding in this case. So, when he played a portion of the trial recordings during his February 18 speech (which was then disseminated nationally by C-SPAN), he violated all of these prohibitions. As Chief Judge Frank Easterbrook of the Seventh Circuit Court of Appeals stated recently in a disciplinary proceeding against a district judge who "allowed video recording and live broadcasting … of a civil proceeding": A district court "judge who contravenes policies adopted by the Judicial Conference and the Judicial Council has 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.'" *In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (quoting 28 U.S.C. § 351(a)).

The setting for Judge Walker's public dissemination of the trial recordings – a speech outside the performance of his official duties – did not exempt him from any of these prohibitions. Rather, he was obligated to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the

integrity and impartiality of the judiciary." Code of Conduct for United States Judges, Canon 2A; *see also* Ninth Circuit Rules of Judicial Conduct art. I, § 3(h)(2) (judge engages in "[c]ognizable misconduct" if his "conduct occurring outside the performance of official duties … might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people"); *cf. United States v. Lang*, 364 F.3d 1210, 1212, 1221-22 (10th Cir. 2004) (court clerk who "took home" copy of "sealed affidavit" convicted under 18 U.S.C. § 2071(a)), *vacated on other grounds*, 543 U.S. 1108 (2005), *reinstated in relevant part*, 405 F.3d 1060, 1061 (10th Cir. 2005).

To ensure that the confidentiality of the trial recordings is not breached again, as well as to restore public confidence in the judiciary, this Court should exercise its inherent power to control the record of this case by ordering that former district judge Walker cease further disclosures of the trial recordings, or any portion thereof, and that all copies of the trial recordings that are in the possession, custody, or control of any party to this case or of former judge Walker be returned promptly to the Court and held by the court clerk under seal.

A. The Recordings of the Trial Proceedings Are Under Seal

Then-Chief Judge Walker "DIRECTED" the district court clerk "to file the trial recording under seal as part of the record." Ex. 28 at 4. Since then, the trial

recordings have remained continuously under seal. *See* Circuit Advisory Comm. Note to R. 27-13 ("Absent an order to the contrary, any portion of the district court … record that was sealed below shall remain under seal upon transmittal to this court."). The purpose of the seal is to preserve the confidentiality of the sealed record. *See United States v. Nixon*, 417 U.S. 960, 960-61 (1974).

B. Chief Judge Walker Unequivocally Assured Proponents That the Trial Recordings Would Be for His Exclusive Use in Chambers

Although the Supreme Court had just stayed his broadcast order, then-Chief Judge Walker insisted on recording the trial proceedings anyway. In doing so over Proponents' objection, Chief Judge Walker assured Proponents on the record that the recording was "*not going to be for purposes of public broadcasting or televising*," but rather "*simply for use in chambers*." Ex. 1 at 754:22-23, 755:3-4 (emphasis added). In reliance on Chief Judge Walker's assurances, Proponents took no further action to prevent him from recording the trial proceedings. One of Proponents' witnesses also relied on those assurances, and now the recording of a portion of his testimony has been shown by Judge Walker to a large public audience and, in turn, has been disseminated nationally by C-SPAN.

C. The Supreme Court's Stay, the Judicial Council's Policy, and the District Court's Local Rule Prohibit Showing the Trial Recordings Beyond the Confines of the Courthouse

The Supreme Court ruled that then-Chief Judge Walker's order authorizing "the broadcast of [this] federal trial" did not comply with "existing rules or

policies." *Hollingsworth*, 130 S. Ct. at 706, 713. True, the Supreme Court's stay later expired when the Court granted Proponents' petition for certiorari and vacated this Court's ruling denying Proponents' earlier mandamus petition. But the certiorari petition, and thus the Supreme Court's disposition thereof, were predicated on the fact that the mandamus petition was moot in light of Chief Judge Walker's unequivocal assurances that the trial recordings were solely for his use in chambers. But for those assurances, the recording of the trial would plainly have violated the Supreme Court's stay and would surely have been halted.

The "rules" and "policies" enforced by the Supreme Court's stay were those governing the issue in this Circuit and the district court. The long-standing policy of the Ninth Circuit Judicial Council still prohibits the "taking of photographs and radio and television coverage of court proceedings in the United States district courts." Ex. 5. This policy is binding on all judges within the Ninth Circuit. 28 U.S.C. § 332(d)(2); *see In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083; *In re Sony BMG Music Entm't.*, 564 F.3d 1, 7-9 (1st Cir. 2009).[2]

Likewise, the district court's Local Rule 77-3 still "prohibit[s] the streaming

[2] The Council purported to "amend" its policy to authorize a pilot program for broadcasting trial proceedings. Even if that amendment were validly adopted, *but see Hollingsworth*, 130 S. Ct. at 708, 713-14 (noting lack of statutorily required "notice and comment procedures" and lack of "considered standards or guidelines … for broadcasting"), the Council's policy would still bar Judge Walker's public dissemination of the trial recordings beyond the confines of the courthouse because this case was not part of the pilot program.

of transmissions, or other broadcasting or televising, [of district court proceedings] beyond 'the confines of the courthouse.'" *Hollingsworth*, 130 S. Ct. at 711. That "rule[] ha[s] the force of law." *Id*. at 710 (quotation marks omitted).[3]

Finally, the policy of the Judicial Conference of the United States, which is "at the very least entitled to respectful consideration," strongly counsels against public dissemination of the trial recordings beyond the confines of the courthouse. *Id*. at 711-12 (quotation marks omitted).[4]

II. THE COURT SHOULD ORDER THE IMMEDIATE RETURN OF ALL COPIES OF THE TRIAL RECORDINGS

This Court "has supervisory power over its own records and files, and access [may be] denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *Matter of*

[3] To be sure, the district court again purported to amend Local Rule 77-3 in April or May 2010 to "create[] an … exception to Rule 77-3's general ban on the broadcasting of court proceedings 'for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit.'" *Hollingsworth*, 130 S. Ct. at 711. But even if the amendment were valid, *but see id.* at 708, 713-14 (noting lack of "considered standards or guidelines … for broadcasting"), the rule would still bar public dissemination of these trial recordings beyond the confines of the courthouse because this case was not, and could not have been, designated for inclusion in the pilot program after the renewed amendment to Local Rule 77-3 was adopted. The only order designating the case for a pilot program was withdrawn long before that amendment was adopted. Ex. 10-11.

[4] In September 2010, the Conference announced a "pilot project to evaluate the effect of cameras in district court courtrooms, of video recordings of proceedings therein, and of publication of such video recordings." Ex. 33 at 11. This pilot project would not have authorized broadcast of the trial proceedings here because it requires the "consent" of the "[p]arties." *Id*. at 12.

Sealed Affidavit(s), 600 F.2d 1256, 1257 (9th Cir. 1979) ("courts have inherent power, as an incident of their constitutional function, to control papers filed with the courts within certain constitutional and other limitations"); *see also* Circuit R. 27-13(d). The record in this case, which includes the trial recordings, is now before this Court, having been transmitted by the district court clerk.

As noted earlier, Proponents previously asked then-Chief Judge Walker to order Appellees to return all copies of the trial recordings. As Proponents explained then, "even with [Chief Judge Walker's] requirement that all copies of the trial video be 'maintain[ed] as strictly confidential,'" the "dissemination [of the trial recordings] beyond the confines of the Court" would unduly increase the risk of "public disclosure" of the recordings. Ex. 26 at 2. Chief Judge Walker denied Proponents' request, but his subsequent use of the trial recordings during his Arizona speech proves that Proponents' concern was well founded. Neither the seal, nor Chief Judge Walker's commitment in open court to use the recordings only in chambers, nor the Supreme Court's decision staying his broadcast order, nor the policy of the Ninth Circuit Judicial Council, nor the district court's local rule, nor the policy of the Judicial Conference of the United States prevented him from publicly showing the trial recordings beyond the confines of the courthouse. Former judge Walker should therefore be ordered to return to this Court all copies of the trial recordings and to cease any further use of any portion thereof. *See*

United States v. New York Tel. Co., 434 U.S. 159, 174 (1977) ("The power conferred by the [All-Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.").

And now that the trial is over and the appeal has been briefed and argued to this Court, there is no legitimate reason for Appellees to continue to have a copy of the trial recordings. They too, therefore, should be ordered to return them to eliminate the risk of accidental disclosure.

CONCLUSION

For the foregoing reasons, the Court should order that former judge Walker cease further disclosures of the trial recordings in this case, or any portion thereof, and that all copies of the trial recordings in the possession, custody, or control of any party to this case or former judge Walker be returned promptly to the Court and held by the court clerk under seal.

April 13, 2011

Respectfully submitted,

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9th Circuit Case Number(s) 10-16696

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EXHIBIT 9

No. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 JW (Honorable James Ware)

PLAINTIFFS-APPELLEES' OPPOSITION TO APPELLANTS' MOTION REGARDING TRIAL RECORDINGS AND PLAINTIFFS-APPELLEES' MOTION TO UNSEAL

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INTRODUCTION

"What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). In January 2010, the United States District Court for the Northern District of California conducted a historic, 12-day *public* trial on an issue of great legal importance and public interest: whether the State of California violated the Due Process and Equal Protection rights of gay men and lesbians when it stripped them of the fundamental right to marry by passing Proposition 8. Through the present Motion, the Proponents of Proposition 8 seek to sequester and forever conceal from the American people video that accurately and without adornment depicts the testimony and argument each party presented at trial, and that the trial court considered when reaching the decision that Proponents now challenge. Although Proponents neither appealed the trial court's decision to record the trial nor objected to the court's decision to allow the parties to use the video in closing arguments, Proponents now complain of an extremely limited use of a snippet of those tapes by the now-retired trial judge in an effort to educate the public about our judicial system and proceedings. Proponents' fierce determination to shield access by any member of the American public to the actual compelling evidence which demonstrated the unconstitutionality of Proposition 8 and the paucity of evidence that Proponents presented in its defense directly conflicts

with this Nation's constitutional commitment to public and open judicial process and serves no legitimate public end. This Court should deny Proponents' motion.

Although Proponents believe that it is somehow too dangerous to allow more of the public to see what transpired in a public trial in a public courtroom, public access to trials "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted). Proponents' contention that, by showing an accurate recording of a small part of a public trial, Chief Judge Walker somehow engaged in conduct prejudicial to the administration of justice (*see* Pet. Mot. 14), stands the First Amendment on its head.

After the broadcast of just three minutes of a three-week public trial, and although Plaintiffs and Plaintiff-Intervenors have scrupulously adhered to the protective order in this case, Proponents ask this Court to require return of "all copies of the trial recordings in the possession, custody, or control of any party to this case or former judge Walker." Pet. Mot. 20. Thus, although Proponents expended tens of millions of dollars on a public campaign to restore discrimination in California that the state Supreme Court had struck down, they now seek to prevent the public from ever observing first-hand their efforts in a public courtroom to defend that discrimination and the

exposure of those efforts to the acid test of cross-examination in open court. The present motion is their latest attempt to prevent the public from witnessing that trial.

There was no reason to keep the video of this trial under the cover of darkness in the first place. Indeed, videos of two of the Proponents' experts and one of the official Proponents of Proposition 8 are already available on the district court's website. https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/index.html. The 13-volume trial transcript is part of the public record and widely available on the internet. So too are reenactment videos of actors reading those transcripts widely available, including on YouTube. Accordingly, this Court should not only deny Proponents' motion, it should order the video's immediate release to allow the public to see the rest of the *actual* witnesses rather than being limited to actors' portrayals.

ARGUMENT

I. The First Amendment Mandates Public Access To Trial Records

Public trials are a cornerstone of our democracy. Access to judicial proceedings is necessary "to protect the free discussion of governmental affairs" essential to our democracy. *Globe Newspaper Co.*, 457 U.S. at 604. Public access to trials and trial records is so important that even a 48-hour delay in unsealing judicial records "is a *total restraint* on the public's first amendment right of access even though the restraint is limited in time." *Associated Press v. United States Dist. Court*, 705 F.2d 1143,

1147 (9th Cir. 1983) (emphasis added). Consequently, "[u]nder the first amendment, the press and the public have a presumed right of access to court proceedings and documents." *E.g., Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)).

Further, because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Indeed, "[o]ur national experience instructs us that except in rare circumstances openness preserves, indeed, is essential to, the realization of that right and to public confidence in the administration of justice. The burden is heavy on those who seek to restrict access to the media, a vital means to open justice . . . ." *ABC, Inc. v. Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004). A trial adjudicating an issue as important and as closely-watched as California's elimination of the constitutional right of gay men and lesbians to marry requires the maximum public access guaranteed by these First Amendment values.

Despite the strong public policy favoring public trials and disfavoring sealing court records, Proponents seek to bar the public from seeing and considering for itself a true and accurate recording of court proceedings that were themselves public and re-

lied on by the District Court in adjudicating this case, including in making its findings of fact and conclusions of law. The recording is a quintessential judicial record of the utmost public importance. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983) ("The public has an interest in ascertaining what evidence and records the District Court . . . relied upon in reaching [its] decisions."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999). It bears emphasizing that *nothing* on these tape recordings can conceivably be characterized as confidential or private information because they merely depict court proceedings that were *themselves* open to the public. Proponents' asserted reason to keep the trial video under seal is to protect their witnesses—two experts, who were paid for testifying in open court and whose identities as witnesses in this case are widely known—from "intimidation." Prop. Mot. 5-6. But this rationale, which Proponents also advanced before the district court and which the court ultimately concluded was baseless (ER 70-71), plainly cannot carry any weight, especially given that the trial ended 15 months ago and no more witnesses will be called. In fact, Proponents failed to submit *any* evidence in the trial court to support their witness intimidation claims. ER 71 ("The record does not reveal the reason behind proponents' failure to call their expert witnesses.").

II. This Motion Is Otherwise Deficient And Improper

Neither the Plaintiffs nor the Plaintiff-Intervenors nor Chief Judge Walker have violated any rule or directive with respect to the video in question. Proponents' request that this Court order return of the tapes should be rejected.

As a threshold matter, while this Court has jurisdiction over the "final decision[] of the district court[]," (28 U.S.C. § 1291), Proponents' motion "For Order Compelling Return of Trial Recordings" does not challenge any decision of the district court. Indeed, Proponents do not challenge the only aspect of the district court's decision that addressed the trial video: its decision to include it in the record under seal. ER 39.

Proponents also have a venue to seek redress of their asserted grievance. The District Court retains jurisdiction over all matters not involved in the appeal. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). And the case has been reassigned to a District Judge who did not preside over the trial and did not decide any of the matters currently challenged. U.S.D.C. Doc #765. Tellingly, Proponents' only source for this Court's authority to afford their desired relief, mentioned only in passing, is this Court's inherent authority to "control the record." Pet. Mot. 15. But Proponents' motion does not, in any way, affect the record. It seeks to control copies of videotapes in the possession of the parties and former Chief Judge

Walker. At a minimum, the district court should be permitted to rule on this issue in the first instance.

Even if this issue were properly before this Court, as Chief Judge Walker's letter to this Court explains, the few minutes of testimony that he played before students at two universities and the Federal Bar Association came from a disk drive that he received with his other judicial papers. Letter from Vaughn R. Walker, Apr. 14, 2011, ECF No. 339. During these lectures, Chief Judge Walker has drawn from his experience over more than two decades of public service to promote public discourse regarding access to judicial proceedings. *Id*.; *see also* Library of Congress Online Catalog, http://catalog.loc.gov (containing public, historical archive of numerous judicial papers including those of Chief Justices Marshall, Taney, Taft, and Hughes, Justices Brandeis, Holmes, Frankfurter, and Van Devanter). Contrary to Proponents' assertions, the very purpose of Chief Judge Walker's lectures has been to "promote[] public confidence in the integrity and impartiality of the judiciary." *See* Pet. Mot. 14-15 (quoting Code of Conduct for United States Judges, Canon 2A); ECF No. 339. That he has sought to improve the public's knowledge of the federal government by displaying a brief snippet of his experience rather than summarizing it or sharing his notes or that his judicial papers take the form of a video file on a hard disk rather than words on a printed page is of no moment. ECF No. 339.

While Proponents claim otherwise, neither prior orders nor local rules barred Chief Judge Walker's use of the trial video. First, while Chief Judge Walker directed the parties to maintain their copies of the trial video tapes pursuant to the terms of the protective order in this action, there is no dispute that they have faithfully done so. Proponents cannot convert that direction, or the fact that the video tapes were submitted to this Court under seal, into an absolute bar on any use of those tapes by the trial judge. Nor did Chief Judge Walker's use of a brief excerpt of video violate the Supreme Court's ruling staying the live broadcast of the trial. *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010)) (per curiam). That decision was explicitly limited to "the live streaming of court proceedings to other federal courthouses" and did not address other uses, such as the "broadcast of court proceedings on the Internet," let alone the very limited use challenged here. *Id.* at 709.

Further, because the district court recorded the trial proceedings for use "in connection with preparing the findings" (ECF. No. 339 at 1), Chief Judge Walker did not violate the district court's Local Rule 77-3, which prohibits recording trial proceedings with the intent to publicly broadcast. Proponents argue that they were somehow harmed because Chief Judge Walker has now used a small portion of the video for purposes other than use in his chambers. *See* Pet. Mot. 8-9. However, inasmuch as they never appealed the district court's decision to record the trial or objected to Plain-

tiffs' use of the trial video in closing arguments, which clearly was not a use solely in Chief Judge Walker's chambers, Proponents' argument is not only too little, but too late.

In all events, Chief Judge Walker's use of the trial video was harmless. The video ran approximately three minutes and showed the cross-examination of Proponents' paid expert, Kenneth Miller, a professor at Claremont McKenna College who is publicly known. *See, e.g.*, Kenneth P. Miller, Claremont McKenna College, www.claremontmckenna.edu/academic/faculty/profile.asp?Fac=406. In fact, rather than submitting a declaration regarding the harm allegedly suffered by Dr. Miller or its only other witness, David Blankenhorn, Proponents reiterate the same unsubstantiated and speculative allegations of harm that the district court previously rejected in findings of fact after the trial. ER 70-71 (finding as not credible Proponents' assertion that their witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever.").

III. The Recordings Of The Trial Should Be Unsealed

Because trials are presumptively public affairs, this Court should unseal the video of this public trial. *See* 9th Cir. R. 27-13(d); *Publicker Indus, Inc. v. Cohen*, 733 F.2d 1059, 1068-71 (3d Cir. 1984) (First Amendment right of access to judicial proceedings applies to civil trials); *Brown & Williamson Tobacco Corp.*, 710 F.2d at

1178 (same); *see also, e.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984). The First Amendment right of access to judicial proceedings exists because "[o]penness of the proceedings will help to ensure [the] important decision is properly reached and enhance public confidence in the process and result." *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1516 (9th Cir. 1988).

In addition to the First Amendment interest, the public has a common law right to view judicial records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (footnote omitted). This right cannot be abridged absent "a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." *Publicker Indus.*, 733 F.2d at 1070. Where, as here, the subject of the trial is a matter of great public importance, the public's right to see the trial is heightened. Moreover, Proponents cannot and do not argue that the subject of the trial was in any way confidential or contained sensitive, proprietary information of any party, given that the live proceedings were themselves public.

Alternatively, because use of the trial video would aid the parties in connection with any additional proceedings before this or any other court, and because the parties

have dutifully complied with the protective order, the Court should reject Proponents' demand that Plaintiffs return their copy of the trial video. In the meantime, the protective order remains in place and ensures that the trial video will not be publicly disclosed, unless the Court determines that it should be unsealed.

CONCLUSION

Proponents have not remotely overcome the exacting burdens imposed by the First Amendment and the common law as prerequisites for throwing a blanket over a true, accurate and unedited record of a widely publicized public trial of an exceedingly important constitutional issue affecting millions of Americans. The Court should deny Proponents' motion and grant Plaintiffs' request to unseal the trial video.

Dated: April 15, 2011

Respectfully submitted,

/s/ Theodore B. Olson

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9th Circuit Case Number(s) 10-16696

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EXHIBIT 10

FILED

APR 27 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY; et al.,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; et al.,

Defendants,

and

DENNIS HOLLINGSWORTH; et al.,

Intervenor-Defendants - Appellants.

No. 10-16696

D.C. No. 3:09-cv-02292-VRW
Northern District of California,
San Francisco

ORDER

Before: REINHARDT, HAWKINS, and N.R. SMITH, Circuit Judges.

Appellants have moved this court to order the Plaintiffs and former District Judge Vaughn Walker to return copies of the video recordings of the trial proceedings in this case. Plaintiffs oppose the motion and have moved to unseal the video recordings.

We construe Appellants' motion as a motion to enforce, against Plaintiffs and Judge Walker, the protective order entered by the district court, *see* Doc. No. 425 (at ¶ 7.3) & Doc. No. 672, *Perry v. Schwarzengger*, No. 3:09-cv-02292 (N.D. Cal.), and Plaintiffs' cross-motion as a motion to lift that order. Although jurisdiction over the merits of the decision below, including the judgment, has passed to this court, the district court has not been divested of its jurisdiction over ancillary matters, such as protective orders. *Cf. Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal*.") (emphasis added); *see, e.g.*, *Campbell v. Blodgett*, 982 F.2d 1356, 1357 (9th Cir. 1993) (district court retains jurisdiction to issue discovery order); *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983) (district court retains jurisdiction to consider motion for attorney's fees).

Because the district court issued the protective order and has the power to grant the parties all the relief they seek, should relief be warranted, we direct the Clerk to TRANSFER Appellants' motion (Doc. No. 338), Plaintiffs' opposition and cross-motion (Doc. No. 340), Appellants' reply and opposition (Doc. No. 346), Plaintiffs' reply (Doc. No. 347), Judge Walker's letter (Doc. No. 339), and Media

Coalition's motion to intervene (Doc. No. 343) and joinder in Plaintiffs' motion to unseal (Doc. No. 345), to the U.S. District Court for the Northern District of California, Case No. 3:09-cv-02292-JW.

IT IS SO ORDERED.

EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,

Plaintiffs,

v.

Arnold Schwarzenegger, et al.,

Defendants.

/

NO. C 09-02292 JW

ORDER GRANTING PLAINTIFFS' MOTION TO UNSEAL DIGITAL RECORDING OF TRIAL; GRANTING LIMITED STAY

I. INTRODUCTION

Foremost among the aspects of the federal judicial system that foster public confidence in the fairness and integrity of the process are public access to trials and public access to the record of judicial proceedings. Consequently, once an item is placed in the record of judicial proceedings, there must be compelling reasons for keeping that item secret. In the course of the non-jury trial of this case, at the direction of the presiding judge, court staff made a digital recording of the trial. After the close of the evidence, the judge ordered the clerk of court to file that digital recording under seal. The trial record is closed and the case is currently on appeal to the Ninth Circuit.

Presently before the Court is a Motion by Plaintiffs to unseal the recording.[1] The Motion is opposed by Defendant-Intervenors. Upon review of the papers and after a hearing conducted on August 29, 2011, the Court concludes that no compelling reasons exist for continued sealing of the

[1] (hereafter, "Motion," Docket Item No. 771-4.) This Motion was originally brought before the Ninth Circuit, which currently has appellate jurisdiction over the merits of the underlying decision in this case, including the judgment. (See Order at 2, Docket Item No. 771.) On April 27, 2011, the Ninth Circuit transferred the Motion to this Court, on the ground that this Court still has jurisdiction over "ancillary matters" associated with this case. (Id. at 2-3.)

digital recording of the trial. Accordingly, the Court GRANTS Plaintiffs' Motion to Unseal and ORDERS the Clerk of Court to place the digital recording in the publicly available record of this case.

II. BACKGROUND

The digital recording at issue in this Motion is of a trial over which former Chief Judge Vaughn Walker (retired) presided. A detailed summary of the background of the case and its procedural history can be found in the Order issued by Judge Walker on August 4, 2010.[2] Here, the Court reviews the procedural history relevant to the present Motion.

On December 21, 2009, a coalition of media companies requested Judge Walker's permission to televise the trial.[3] (See Docket Item No. 313.) On January 6, 2010, Judge Walker held a hearing regarding the recording and broadcasting of the trial at which he announced that an audio and video feed of the trial would be streamed to several courthouses in other cities, and that the trial would be recorded for broadcast over the Internet. Hollingsworth, 130 S. Ct. at 708-09. On January 7, 2010, Judge Walker notified the parties that the Court had made a formal request to Ninth Circuit Chief Judge Kozinski that the trial be included in a pilot program being conducted by the Ninth Circuit that allowed audio-video recording and transmission of non-jury trial court proceedings. (See Docket Item No. 358.) On January 8, 2010, Chief Judge Kozinski issued an order approving real-time streaming of the trial to certain courthouses, pending the resolution of technical difficulties. Hollingsworth, 130 S. Ct. at 709.

On January 9, 2010, Defendant-Intervenors applied to the Supreme Court for a stay of the Court's order approving the broadcasting of the trial, which the Supreme Court granted on January 13, 2010. See id. at 709-10 (staying the broadcast because the Northern District of California's amendment of its Local Rules to permit broadcast of the trial "likely did not" comply with federal

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[2] (See Pretrial Proceedings and Trial Evidence; Credibility Determinations; Findings of Fact; Conclusions of Law; Order, hereafter, "August 4 Order," Docket Item No. 708.)

[3] A detailed discussion of the factual background of the Court's consideration of whether the trial should be recorded or broadcast may be found in the Supreme Court's opinion staying the broadcast of the trial. See Hollingsworth v. Perry, 130 S. Ct. 705 (2010).

law). On January 15, 2010, Judge Walker notified the parties that, in compliance with the Supreme Court's January 13, 2010 Order, he had formally requested Chief Judge Kozinski to withdraw the case from the pilot project. (See Docket Item No. 463 at 2.)

Although he did not commence broadcasting of the trial, Judge Walker notified the parties that digital recording of the trial would continue "for use in chambers." (See Docket Item No. 463 at 2.) Later, on May 31, 2010, Judge Walker expanded the use of the recording. He notified the parties that "[i]n the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." (Docket Item No. 672 at 2.) He ordered that the parties "to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order."[4] (Id.) On June 2, 2010, both Plaintiffs and Plaintiff-Intervenor City and County of San Francisco requested a copy of the digital recording, pursuant to the Court's May 31, 2010 Order.[5] In the August 4 Order, Judge Walker noted that the "trial proceedings were recorded and used by [the Court] in preparing the findings of fact and conclusions of law" and directed the Clerk to "file the trial recording under seal as part of the record." (August 4

[4] On January 12, 2010, the parties entered into an Amended Protective Order. (hereafter, "Protective Order," Docket Item No. 425.) The Protective Order was entered because disclosure and discovery activity in the case would be "likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted." (Id. at 1.) Paragraph 7.3 of the Amended Protective Order addresses items that are designated as "HIGHLY CONFIDENTIAL–ATTORNEYS' EYES ONLY," and states that such items may only be disclosed to the parties' counsel of record, certain experts, the Court and its personnel, "court reporters, their staffs, and professional vendors" who have signed an agreement to be bound by the Protective Order and the author of the item. (Id. at 8-9.) The Protective Order specifies that "[e]ven after the termination of this litigation, the confidentiality obligations imposed by [the Order] shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs." (Id. at 2.)

[5] (See Notice to Court Clerk from Plaintiff-Intervenor City and County of San Francisco Re Use of Video, Docket Item No. 674 (stating that Plaintiff-Intervenor "wishes to obtain a copy of [certain portions] of the trial video to review for possible use at closing argument"); Notice to Court Clerk Re Plaintiffs' Request for a Copy of the Trial Recording, Docket Item No. 675 (stating that Plaintiffs "respectfully request a copy of the trial recording for possible use during closing arguments").)

Order at 4.) The Order also provided that the "parties may retain their copies of the trial recording pursuant to the terms of the protective order."[6] (Id.)

After judgment was entered, an appeal from the Judgment was taken to the Ninth Circuit. (See Docket Item Nos. 719, 728.) During the course of the appeal, Defendant-Intervenors moved to prevent Judge Walker from showing snippets of the recording from a copy which he took as part of his judicial papers upon his retirement and to compel Judge Walker, as well as Plaintiffs and Plaintiff-Intervenor, to return the recording. Along with their opposition to that motion, Plaintiffs filed what the Ninth Circuit deemed a Cross-Appeal to unseal the recording. On June 14, 2011, the Court denied Defendant-Intervenors' Motion. (June 14 Order at 1.) This Order addresses Plaintiffs' Cross-Motion to Unseal the recording.

Plaintiffs, joined by a non-party coalition of media companies,[7] move the Court to unseal the digital recording of the trial on constitutional and common law grounds. (Motion at 9-10.) Defendant-Intervenors oppose unsealing the recording on multiple grounds.[8] As their principal grounds for maintaining the seal, they rely on a statement made by Judge Walker about how the

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[6] On June 14, 2011, after the case was assigned to Chief Judge Ware, the Court issued an order denying Defendant-Intervenors' Motion for Order Compelling Return of Trial Recordings. (hereafter, "June 14 Order," Docket Item No. 798.) In its June 14 Order, the Court explained that copies of the digital recording of the trial had been made available to both parties for use during the trial, and held that because "there is no indication that the parties have violated the Protective Order, and because appellate proceedings in this case are still ongoing, the parties may retain their copies of the trial [digital recording]." (Id. at 4.)

[7] Plaintiffs' Motion has been joined by the Non-Party Media Coalition, which is comprised of Los Angeles Times Communications, LLC; The McClatchy Company; Cable News Network, In Session; The New York Times Co.; FOX News; NBC News; Hearst Corporation; Dow Jones & Company, Inc.; The Associated Press; KQED Inc., on behalf of KQED News and the California Report; The Reporters Committee for Freedom of the Press; and the Northern California Chapter of the Radio & Television News Directors Association. (See Joinder of Non-Party Media Coalition in Plaintiffs-Appellees' Motion to Unseal at 1, Docket Item No. 771-6.) Like Plaintiffs, the Non-Party Media Coalition contends that there is a First Amendment right of access to judicial proceedings, and that the right applies to the digital recording in this case. (Id. at 4-10.)

[8] (Appellants' Opposition to Appellees' Motion to Unseal at 5-7, hereafter, "Opp'n," Docket Item No. 771-7.) In addition, the State Defendants have filed a Statement of Non-Opposition stating that they "do not oppose the Plaintiffs' motion to publicly release the videotapes of the trial of this matter." (Docket Item No. 805 at 2.)

recording would be used, a ruling by the United States Supreme Court and various Judicial Council statements and Northern District Local Rules.

III. DISCUSSION

A. The Digital Recording of the Trial Is in the Record

Before discussing the specific grounds urged in favor and in opposition to unsealing the recording, the Court discusses the significance the Court gives to the fact that the digital recording is part of the judicial record.

It is undisputed that on August 4, 2010, Judge Walker ordered the Clerk to file the digital recording of the trial under seal "as part of the record." (August 4 Order at 4.) District court judges have wide discretion to note adjudicative facts and occurrences for the record. (See, e.g., Fed. R. Evid. 201.) While a digital recording of a trial might be an unusual item, district court judges have the authority to order the clerk to include as part of the record any item indicative of the proceedings. At the time Judge Walker ordered the recording filed as part of the record, none of the parties, including Defendant-Intervenors, made an objection. Moreover, here and now, in their Opposition to unsealing the recording, Defendant-Intervenors do not contend that Judge Walker committed a legal error or abused his discretion when he ordered the digital recording to be filed as part of the record. Furthermore, no party has filed a motion either to vacate the portion of the Court's August 4 Order that directed the Clerk to file the recording as part of the record or to strike the digital recording from the record.[9] Instead, the parties, including Defendant-Intervenors, proceed from the common premise that the digital recording is unquestionably part of the record.[10] The

[9] At the August 29 hearing, the Court brought this issue to the attention of the parties, and was informed by Defendant-Intervenors' counsel that Defendant-Intervenors, to counsel's knowledge, have not considered bringing such a motion. By raising this issue however, the Court is not commenting whether if such a motion were to be made, it would be timely or appropriate.

[10] (See Opp'n at 5-6 (asserting that "the [digital recording is] now part of the record of the case," but contending that this fact "does not matter" because the common law right to access trial records "has no purchase" in this case, insofar as the digital recording was created "only on condition that [it] not be publicly disseminated outside the courthouse").)

parties have limited their argument solely to whether the digital recording should remain sealed. The Court now proceeds to consider the legal standard for maintaining the recording under seal.

B. Legal Standards for Maintaining an Item in the Record Under Seal

Plaintiffs move to unseal the recording on constitutional and common law grounds. Although a number of circuits have explicitly held that there is a First Amendment right of access to court records in civil proceedings,[11] the Ninth Circuit has declined to reach such a conclusion. See San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1101-02 (9th Cir. 1999) ("We leave for another day the question of whether the First Amendment . . . bestows on the public a prejudgment right of access to civil court records."). Accordingly, the Court only evaluates Plaintiffs' Motion to Unseal under the common law.

There is a common law right of public access to records in civil proceedings. Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (citing Nixon v. Warner Comm., Inc., 435 U.S. 589, 597 (1978)). The common law right of access is "a general right to inspect and copy public records and documents, including judicial records and documents." Nixon, 435 U.S. at 597. This right of access is generally not conditioned "on a proprietary interest in the document or upon a need for it as evidence in a lawsuit." Id. Rather, the kinds of public interest that have been found to support the issuance of a writ compelling access to public records include "the citizen's desire to keep a watchful eye on the workings of public agencies" and "a newspaper publisher's intention to publish information concerning the operation of government." Id. at 598.

Transparency "is pivotal to public perception of the judiciary's legitimacy and independence."[12] As the Second Circuit has explained, while the political branches of government can "claim legitimacy by election," judges can only do so by way of their reasoning; thus, "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision

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[11] See, e.g., Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91-92 (2d Cir. 2004) (observing that the Second Circuit recognizes a First Amendment right of access to civil proceedings, and discussing similar caselaw in the Third and Fourth Circuits).

[12] United States v. Aref, 533 F.3d 72, 82 (2d Cir. 2008).

look more like fiat and requires rigorous justification."[13] Therefore, because the Constitution "grants the judiciary 'neither force nor will, but merely judgment,'" it is imperative that courts "impede scrutiny of the exercise of that judgment only in the rarest of circumstances."[14]

This is not to say that transparency must never yield to other interests.[15] There are undoubtedly circumstances in which the damage that would be caused by making public certain aspects of judicial proceedings is so significant that it must override the public's interest in being able to freely scrutinize those proceedings. In determining whether access to the record is appropriate, courts should consider "the interests advanced by the parties in light of the public interest and the duty of the courts." Hagestad, 49 F.3d at 1434 (quoting Nixon, 435 U.S. at 602).

In the Ninth Circuit, the decision whether to unseal an item in the record is "one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Hagestad, 49 F.3d at 1434 (quoting Nixon, 435 U.S. at 599). Courts that consider the common law right of access are instructed to "start with a strong presumption in favor of access to court records." Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003). A party seeking to overcome this strong presumption bears the burden of meeting a "compelling reasons" standard, under which the party must "articulate compelling reasons supported by specific factual findings" that "outweigh the general history of access and the public policies favoring disclosure." Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations omitted). In determining whether the right of access should be overridden, courts should consider "all relevant factors," including "the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." Foltz,

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[13] Id. (citing Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006)).

[14] Id. (citing The Federalist No. 78 (Alexander Hamilton)).

[15] (See, e.g., id. (finding that the "legitimate national-security concerns at play" in a case made it appropriate for the district court to seal certain documents, despite the compelling public interest in a transparent judicial process).)

331 F.3d at 1135 (citing Hagestad, 49 F.3d at 1434). The presumption of access "may be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.'" Hagestad, 49 F.3d at 1434 (citations omitted). Further, a "judge need not document compelling reasons to unseal [a court record]; rather the proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails." Kamakana, 447 F.3d at 1182.

C. Whether the Digital Recording Should Be Unsealed

With a strong presumption in favor of unsealing the digital recording of the trial for the public to access it, the Court considers the grounds urged by Defendant-Intervenors for maintaining the seal. Defendant-Intervenors offer four justifications for maintaining the seal: (1) the circumstances under which the recording was made; (2) an injunction issued by the United States Supreme Court during the proceedings before Judge Walker; (3) unsealing would violate Civil Local Rule 77-3; and (4) public policy concerns. The Court considers each of these contentions in turn.

1. The Conditions Under Which the Digital Recording Was Created

Defendant-Intervenors contend that the digital recording should not now be made public, because it was originally created "on condition that [it] not be publicly disseminated outside the courthouse." (Opp'n at 6.) Defendant-Intervenors contend that Judge Walker's statement that he would use the digital recording during his deliberations constituted a guarantee that the recording would remain sealed. (See id. at 1, 7.) Upon review, the Court finds that the record does not support the contention that Judge Walker limited the digital recording to chambers use only. As discussed above, Judge Walker, without objection, made copies of the digital recording available to the parties for use during closing arguments. (See Docket Item No. 672 at 2.) At least two of the parties obtained copies of the digital recording, and one of the parties played segments on the record during closing argument in open court.

Moreover, Defendant-Intervenors offer no authority in support of the proposition that the conditions under which one judge places a document under seal are binding on a different judge, if a

motion is made to that different judge to examine whether sealing is justified; nor is the Court aware of any authority standing for that proposition.[16]

Accordingly, the Court finds that the conditions under which the digital recording was created do not constitute "compelling reasons" to overcome the strong presumption in favor of granting the public access to the recording.

2. The Injunction by the U.S. Supreme Court

Defendant-Intervenors contend that unsealing the digital recording would violate the injunction issued by the United States Supreme Court. (See Opp'n at 5-7.) However, the Court finds that Defendant-Intervenors' reliance on the Supreme Court's decision is misguided. In its decision staying the broadcasting of the trial, the Supreme Court stated that its "review [was] confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast [the] trial complied with federal law." Hollingsworth, 130 S. Ct. at 709. Without "expressing any view on whether [federal] trials should be broadcast," the Supreme Court held only that the proposed "live streaming of [the] court proceedings" in this case should be stayed "because it appears that the [Northern District of California and the Ninth Circuit] did not follow the appropriate procedures . . . before changing their rules to allow such broadcasting." Id. at 706-09. Accordingly, in light of the Supreme Court's explicit statement that it was solely addressing procedural issues arising from the Northern District's amendment of its local rules regarding the broadcast of court proceedings, the Court finds that the Supreme Court's opinion does not provide

[16] In fact, caselaw suggests that a party's reliance on the confidentiality provisions of a protective order may not suffice to outweigh the strong presumption in favor of public access to court records. See Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 125 (2d Cir. 2006) (holding that the "mere existence of a confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable"). In Lugosch, the court observed that the confidentiality order at issue specifically "contemplate[d] that relief from the provisions of the order may be sought" from the court, and concluded that it was therefore "difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret." Id. Similarly in this case, the Protective Order states that "[n]othing in this Order abridges the right of any person to seek its modification by the Court in the future." (Protective Order at 11.)

"compelling reasons" to overcome the strong presumption in favor of public access to the digital recording, now that the trial is over and the digital recording has entered the court record.

3. Civil Local Rule 77-3

At the August 29 hearing, Defendant-Intervenors contended that the plain language of Local Rule 77-3's prohibition on "the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding" necessarily means that the digital recording may not be unsealed, because unsealing the recording would inevitably result in an unlawful "transmission" of the recording outside the environs of the courtroom.

Admittedly, digital recordings of trial proceedings come within the ambit of Local Rule 77-3.[17] However, Local Rule 77-3 speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses.[18] At the time the digital recording at issue in this case was made, there was no objection that Local Rule 77-3 prohibited its creation; nor is such an argument being made now. Nothing in the language of Local Rule 77-3 governs whether digital recordings may be placed into the record. Nor does the Rule alter the common law right of access to court records if a recording of the trial is placed in the record of proceedings. The Court is unaware of any case holding that a court's local rule on recordings can override the common law right of access to court records. Accordingly, the Court finds that Local Rule 77-3 is not authority for superseding the common law right of access to court records, even for a digital recording of the trial itself.

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[17] The Court uses the version of Local Rule 77-3 that was in effect during the trial.

[18] The Court observes that the "plain language" of Local Rule 77-3 may give rise to several possible interpretations. Defendant-Intervenors, in effect, offer the interpretation that the Rule is intended to be a bridle on district court judges, constraining them from recording judicial proceedings and then entering those recordings into the court record. Another possible interpretation is that the Rule is intended to function as a protective cover for the court, shielding judicial proceedings from being photographed or recorded by outside parties or litigants. Defendant-Intervenors offer no caselaw indicating that the Court should adopt the former interpretation of the Rule. In the absence of any such authority, the Court declines to adopt the former, or any, interpretation of the Rule.

4. The Chilling Effect on Expert Witnesses and Other Public Policy Considerations

Defendant-Intervenors contend that "public dissemination of the [digital recording] could have a chilling effect on . . . expert witnesses' willingness 'to cooperate in any future proceeding.'" (See Opp'n at 7.) However, the Court finds that this contention is mere "unsupported hypothesis or conjecture," which may not be used by the Court as a basis for overcoming the strong presumption in favor of access to court records. Hagestad, 49 F.3d at 1434.

The Court is aware that many observers have expressed concerns that the broadcast of federal judicial proceedings may have detrimental consequences.[19] Indeed, it is because of such concerns that the Judicial Conference of the United States has urged that the circuits exercise caution with respect to the use of cameras in federal courtrooms.[20] Consistent with that advice, the Ninth Circuit has exhibited a willingness to allow the use of cameras in certain district court proceedings, and under certain limited circumstances. On December 17, 2009, the Judicial Council of the Ninth Circuit voted to allow district courts in the Ninth Circuit to "experiment with the dissemination of video recordings in civil non-jury matters only."[21] In accordance with that

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[19] (See, e.g., Opp'n at 3-4 (noting the concerns that broadcasting trial proceedings may, *inter alia*, "intimidate litigants, witnesses, and jurors" and "cause judges to avoid unpopular decisions or positions").)

[20] (See Report of the Proceedings of the Judicial Conference of the United States at 17, *available at* www.uscourts.gov/judconf/96-Mar.pdf (Mar. 12, 1996) (stating that the Conference "[s]trongly urge[d] each circuit judicial council to adopt an order . . . not to permit the taking of photographs and radio and television coverage of court proceedings in the United States district courts.").) On June 21, 1996, the Judicial Council of the Ninth Circuit voted to prohibit the "taking of photographs and radio and television coverage of court proceedings in the United States district courts," in accordance with the Judicial Conference's recommendation. (See Appellants' Motion for Order Compelling Return of Trial Recordings, Ex. 5, Docket Item 771-2.) On September 14, 2010, however, the Judicial Conference of the United States evinced a willingness to reconsider its stance on the propriety of recording district court proceedings by approving a pilot project to "evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and publication of such video recordings." (See Judiciary Approves Pilot Project for Cameras in District Courts, *available at* http://www.uscourts.gov/news/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx.)

[21] (See Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts, *available at* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf.) The Ninth

decision, the Ninth Circuit created a "pilot program" for recording certain district court cases. (Id.) It is true that the Supreme Court stayed the broadcast of this trial. However, as discussed above, the Supreme Court only stayed the broadcast on the grounds that the Northern District's revision of its Local Rules to permit the broadcast "likely did not" comport with federal law. Hollingsworth, 130 S. Ct. at 709-10. The Supreme Court did not invalidate the Ninth Circuit's policy in regard to the recording of civil non-jury district court proceedings. Thus, at the time the digital recording was made, it was the policy of the Ninth Circuit that the recording of civil non-jury district court proceedings was permissible.[22] Accordingly, the Court finds that the policy concerns expressed by the Judicial Conference of the United States do not prevent the Court from unsealing the digital recording of this civil, non-jury trial.

Although the Court acknowledges that significant public policy concerns are implicated in allowing cameras in federal courtrooms, nothing in this Order speaks to the broader question of whether district court trials should be recorded or broadcast. Rather, this Order solely addresses the narrow question of whether the digital recording in this case, which is in the record, should now be unsealed pursuant to the common law right of access to court records. The Court answers that question in the affirmative, without addressing any of the larger questions that may potentially arise from circumstances similar to this case.

5. The Fairness of the Trial Is Not Part of This Consideration

In addition to relying on constitutional and common law bases for unsealing the recording, at the August 29 hearing, Plaintiffs argued that the digital recording of the trial should be unsealed in order to assist the litigants in rebutting arguments made by Defendant-Intervenors, including, *inter alia*, arguments about the fairness of the trial. The Court declines to base its decision on whether to

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Circuit explained that its decision "amend[ed]" the prior Ninth Circuit policy prohibiting the taking of photographs and radio and television coverage of court proceedings in the district courts. (Id.)

[22] See also Hollingsworth, 130 S. Ct. at 715-17 (Breyer, J., dissenting) (setting forth, as "context" for the Northern District's amendment of its Local Rules, the history of the Ninth Circuit Judicial Council's decision to permit "the use of cameras in district court civil nonjury proceedings" following the 2007 Ninth Circuit Judicial Conference, at which lawyers and judges voted to approve a resolution to that effect "by resounding margins").

unseal the digital recording because of their usefulness before the Ninth Circuit. That is a matter solely for the Ninth Circuit to decide.

Similarly, at the August 29 hearing Defendant-Intervenors argued that, because the digital recording is under seal and arguably must remain so, the Ninth Circuit judges hearing the appeal in this case are prohibited from playing the recording as part of their proceedings as prohibited by this district Local Rule 77-3.[23] The Court does not accept the validity of this argument. Regardless, the Court does not base its decision whether to unseal the recording on the effect that the decision would have on the availability of the recording to the Ninth Circuit. The Court reiterates that the *only* issue it is resolving in this Order is whether the digital recording of the trial should be unsealed pursuant to the common law right of access to court records, given that the recording is a court record.

IV. CONCLUSION

The Court GRANTS Plaintiffs' Motion to Unseal. Subject to the Stay Order issued below, the Clerk of Court is directed to place the digital recording of the trial into the public record.

When the digital recording is placed in the public record, the confidentiality obligations of the Protective Order, as applied to the digital recording of the trial, are LIFTED.

The Clerk of Court is directed to immediately return to Judge Walker the copy of the digital recording that was given to him as part of his judicial papers, which he subsequently lodged with the Court during the pendency of this Motion.[24]

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[23] The Court notes that Defendant-Intervenors mildly withdrew this contention at the end of the August 29 proceeding.

[24] In its April 28, 2011 Order, the Court ordered "[a]ll participants in the trial," including Judge Walker, "who are in possession of a recording of the trial proceedings" to appear at the June 13, 2011 hearing "to show cause as to why the video tapes should not be returned to the Court's possession." (Order Setting Hearing on Motion at 2, Docket Item No. 772.) On May 12, 2011, Judge Walker voluntarily lodged his chambers copy of the digital recording of the trial with the Court, which filed the copy under seal. (See Docket Item Nos. 777, 781.) In its June 14 Order, the Court stated that it "intends to return the trial video tapes to Judge Walker as part of his judicial papers," and invited any party who objects to "articulate its opposition in . . . supplemental briefing." (June 14 Order at 5.) In accordance with the Court's June 14 Order, Defendant-Intervenors filed a supplemental brief opposing the return of the digital recording of the trial to Judge Walker, and requesting that the Court "direct Judge Walker to maintain his copy of the trial video tapes in strict compliance with the . . . terms of the Protective Order" sealing the recording,

The Court STAYS the execution of this Order until **September 30, 2011**. Unless a further stay is granted by the Court on timely motion or by a higher court, on September 30, 2011, the Clerk is ordered to execute this Order.

Dated: September 19, 2011

JAMES WARE
United States District Chief Judge

should the Court decide to return his copy of the recording to Judge Walker. (See Docket Item No. 806 at 2-3.) However, in light of the Court's disposition of the Motion to Unseal, Defendant-Intervenors' request for an order directing Judge Walker to comply with the Protective Order sealing the recording of the trial is DENIED as moot.

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: September 19, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

United States District Court
For the Northern District of California

EXHIBIT 12

No. 11-17255
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr. et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

DEFENDANT-INTERVENORS-APPELLANTS DENNIS HOLLINGWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECTMARRIAGE.COM'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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Circuit Rule 27-3 Certificate

Pursuant to Circuit Rule 27-3, Appellants respectfully certify that their motion for a stay pending appeal is an emergency motion requiring at least temporary "relief … in less than 21 days" in order to "avoid irreparable harm."

Appellants are official Proponents of Proposition 8 and the official Yes on 8 campaign (collectively, "Proponents"), who were permitted to intervene in this case to defend that California ballot initiative against a challenge by two same-sex couples ("Plaintiffs"). Following the trial in this case and the retirement of the presiding judge, Plaintiffs moved to unseal a video-recording of the trial proceedings in this case. The district court granted Plaintiffs' motion on September 19. At Proponents' request, Chief Judge Ware granted a stay of his ruling that will expire on Friday, September 30, 2011. He did not, however, rule on Proponents' request for a stay pending appeal.[1]

As elaborated in Proponents' stay motion, the district court's unlawful decision to unseal the recording will cause immediate irreparable harm. Because the district court ordered the Clerk to execute the order on September 30, "relief is needed in less than 21 days" in order to prevent these irreparable injuries. Cir. R.

[1] Accordingly, Proponents have satisfied the procedural prerequisite for seeking a stay from this Court. *See* Fed. R. App. P. 8(a)(1). Out of an abundance of caution, Proponents renewed their request for a stay pending appeal with the district court shortly before this filing, but in view of the looming September 30 expiration of the current stay, prompt relief from this Court is urgently needed and fully warranted.

27-3(a). Accordingly, Proponents respectfully request that the Court immediately stay the district court's order pending appeal.

All of the grounds in the stay motion have been presented to the district court, and, before filing this motion, Proponents notified counsel for the other parties by email and also emailed them a service copy of the motion.

Pursuant to 9th Cir. R. 27-3(a)(3)(i), the telephone numbers, email addresses, and office addresses of the attorneys for the parties are as follows:

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Dated: September 23, 2010

s/Charles J. Cooper
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Corporate Disclosure Statement Under Fed. R. App. P. 26.1

Defendant-Intervenor-Appellant ProtectMarriage.com is not a corporation but a primarily formed ballot committee under California Law. *See* CAL. GOV. CODE §§ 82013 & 82047.5. Its "sponsor" under California law is California Renewal, a California nonprofit corporation, recognized as a public welfare organization under 26 U.S.C. § 501(c)(4).

Pursuant to Fed. R. App. P. 8(a)(2), Appellants respectfully seek a stay of the district court's judgment of September 19, 2011 (attached as Ex. 1), pending resolution of their appeal.

INTRODUCTION

"In 1996, the Judicial Conference of the United States adopted a policy opposing the public broadcast of [trial] court proceedings." *Hollingsworth v. Perry*, 130 S. Ct. 705, 711 (2010); *see also* Ex. 2 at 54. This policy was rooted in "decades of experience and study" showing the potentially negative impact of broadcasting on trial proceedings. Ex. 3 at 1; *see also Hollingsworth*, 130 S. Ct. at 711-12; Ex. 4 at 46-47. In July 2009 the Judicial Conference forcefully reiterated to Congress its conclusion that the "negative [e]ffects of cameras in trial court proceedings far outweigh any potential benefits." Ex. 3 at 1.

Also in 1996, the Ninth Circuit Judicial Council "voted to adopt the policy of the Judicial Conference of the United States regarding the use of cameras in the courts." Ex. 5. The Council's policy thus provided: "The taking of photographs and radio and television coverage of court proceedings in the United States district courts is prohibited." *Id*. "[T]his policy [was] . . . binding on all courts within the Ninth Circuit." *Id*. Accordingly, the Northern District of California adopted Local Rule 77-3, which prohibits the "taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in

connection with any judicial proceeding." *Hollingsworth*, 130 S. Ct. at 710-11 (quoting Rule 77-3); *see also id*. at 707 (Rule 77-3 "forbid[s] the broadcasting of trials outside the courthouse in which a trial takes place"); Ex. 6.

In plain contravention of these authorities and in the teeth of the Supreme Court's decision enforcing them in this very case, the district court below ordered that video recordings of the trial proceedings in this case be unsealed and made available to the public. Ex. 1 at 13. And it did so even though these recordings owed their very existence to the district court's solemn assurance, in open court, that they would *not* be used for "purposes of public broadcasting or televising." Ex. 7 at 754:21-23. Not only was this assurance necessary to comply with Rule 77-3 and the policies of the Judicial Conference and this Court's Judicial Council, but it came on the heels of an emergency Supreme Court decision specifically enforcing Rule 77-3 after then-Chief Judge Walker had ordered the trial to be broadcast.

The decision below thus goes beyond simply violating a binding rule, disregarding longstanding judicial policies, and directly defying the Supreme Court's ruling in this very case. Rather, by setting at naught a solemn commitment made by a federal judge on which litigants and witnesses relied to their detriment, the decision below threatens deep and lasting harm to the integrity and credibility of the federal judiciary. As explained more fully below, the extraordinary ruling unsealing the video recordings should be stayed pending appeal.

STATEMENT

Two same-sex couples filed this suit claiming that Proposition 8, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California," Cal. Const. art. I, § 7.5, violates the Federal Constitution. The case was assigned to the Honorable Vaughn R. Walker, who at the time was Chief Judge of the Northern District of California. Correctly anticipating that the state officials named as defendants would refuse to defend Proposition 8, the official proponents of the measure and their official campaign committee (collectively "Proponents") successfully moved to intervene.

As the case proceeded, Chief Judge Walker expressed a strong desire to publicly broadcast the forthcoming trial, notwithstanding Proponents' repeated warning that several of their witnesses would decline to testify if the proceedings were broadcasted. *See, e.g.*, Ex. 26 at 7. On January 6, 2010 (five days before the start of trial) he ordered that it be broadcast daily via the internet. *Hollingsworth*, 130 S. Ct. at 707; Ex. 8 at 16-17. Chief Judge Walker's determined effort to broadcast the trial, and the lawless procedural irregularities it occasioned, are recounted in detail in the Supreme Court's decision staying Chief Judge Walker's order and prohibiting the public broadcast of the trial. *See Hollingsworth*, 130 S. Ct. at 708-09, 711-12, 714-15. It suffices to repeat the Supreme Court's conclusion: "The District Court here attempted to revise its rules in haste, contrary

to federal statutes and the policy of the Judicial Conference of the United States," solely "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Id.* at 713; *see also id*. (Chief Judge Walker's order "complied neither with existing rules or policies nor the required procedures for amending them").

Despite the Supreme Court's ruling, Chief Judge Walker insisted over Proponents' objection on video recording the trial. *See* Ex. 8 at 16:12-18; Ex. 9 at 1; Ex. 7 at 753:22-754:6. In rejecting Proponents' objection, Chief Judge Walker stated that Rule 77-3 "permits . . . recording for purposes of use in chambers," and that the recordings "would be quite helpful to [him] in preparing the findings of fact." *Id*. at 754:15-19. He assured Proponents that "that's the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." *Id*. at 754:21-23 (emphasis added).

On May 31, Chief Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments" and made "a copy of the video . . . available to the part[ies]." Ex. 11. The parties were instructed to "maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id.*, which restricts "highly confidential" material to the parties' outside counsel and experts and to the district court and its personnel. Ex. 12 at 8. Plaintiffs and Plaintiff-intervenor City and County of San Francisco

requested and were given copies of the recording of the trial proceedings, *see* Ex. 13, portions of which were played during closing argument, *see* Ex. 14. Separately, Chief Judge Walker denied a request by a media coalition to broadcast closing argument outside the courthouse. *See* Ex. 16.

Proponents moved for the return of all videos to the district court after closing argument, but Chief Judge Walker denied the motion and "DIRECTED" the district court clerk to "file the trial recording under seal as part of the record" and allowed Plaintiffs (and San Francisco) to "retain their copies of the trial recording pursuant to the terms of the protective order." Ex. 17 at 4. Elsewhere in the same order, Chief Judge Walker stated that "the potential for public broadcast" of the trial proceedings "had been eliminated." *Id*. at 35-36.

Meanwhile, Proponents petitioned the Supreme Court for review and vacatur of this Court's ruling, issued before the Supreme Court's stay, denying their mandamus petition seeking to prohibit broadcast of the trial. Proponents argued that, in light of Chief Judge Walker's "unequivocal[] assur[ances] that [his] continued recording of the trial proceedings was not for the purpose of public dissemination, but rather solely for that court's use in chambers," this Court's mandamus ruling should be vacated as moot. Ex. 18 at 11-13. The Supreme Court granted the petition and vacated this Court's ruling. *See* Ex. 19.

Despite Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, the Supreme Court's prior decision in this case, the sealing order, and his own solemn commitment in open court, on February 18, 2011, Chief Judge Walker began to broadcast portions of the video recordings of the trial in connection with his teaching and public speaking. *See* Ex. 20 at 1-2. After learning of Chief Judge Walker's activities, Proponents promptly moved the district court to order the return of all copies of the trial recordings. Chief Judge Ware, who had replaced Chief Judge Walker as the presiding judge below, denied this motion, Ex. 21 at 4, and subsequently granted Plaintiffs' cross-motion to unseal the recordings, Ex. 1 at 13. At Proponents' request, *see* Ex. 23 at 54:14-18, Chief Judge Ware granted a temporary stay of his ruling that will expire on September 30, 2011, Ex. 1 at 14.[1] He did not, however, rule on Proponents' request for a stay pending appeal. Ex. 23 at 54:14-18.[2] Proponents noticed this appeal on September 22, 2011.

[1] Former Chief Judge Walker voluntarily lodged his copy of the recordings with the district court pending resolution of Proponents' motion and Plaintiffs' cross-motion. *See* Ex. 22. In its order granting Plaintiffs' cross-motion to unseal, the district court ordered that Chief Judge Walker's tapes be returned to him and, "in light of the Court's disposition of the Motion to Unseal," denied "as moot" Proponents "request for an order directing Judge Walker to comply with the Protective Order sealing the recording of the trial." Ex. 1 at 13-14 & n.24. Given that its denial of this request appears to rest on its disposition of the motion to unseal, Proponents' understand that this portion of the district court's ruling is subject to the temporary stay entered by the district court and would be subject to any stay issued by this Court as well.

[2] Proponents have thus satisfied the procedural prerequisite for seeking a stay from this Court. *See* Fed. R. App. P. 8(a)(1). Out of an abundance of caution,

ARGUMENT

Four factors guide this Court's consideration of Proponents' emergency petition for a stay pending appeal: (1) Proponents' likelihood of success on the merits, (2) the possibility of irreparable harm absent a stay; (3) the possibility of substantial injury to other parties if a stay is issued; and (4) the public interest. *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). These factors all point to the same conclusion: This Court should "suspend[] judicial alteration of the status quo" by staying the district court's order pending appeal. *Nken v. Holder*, 129 S. Ct. 1749, 1758 (2009).

I. PROPONENTS' APPEAL IS LIKELY TO SUCCEED.

A. The district court's order contravenes Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, and the Supreme Court's previous decision in this case.

As the district court implicitly recognized in grounding its ruling in the public's common-law right of access to judicial records, unsealing the video-recordings will intentionally and inevitably lead to their public broadcast outside " 'the confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 711 (quoting Rule 77-3). The order unsealing the recordings thus plainly violates Rule 77-3, as well

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Proponents renewed their request for a stay pending appeal with the district court shortly before this filing, but in view of the looming expiration of the current stay, prompt relief from this Court is urgently needed and fully warranted.

as the longstanding policies of the Judicial Conference and this Court's Judicial Council. It also directly defies the Supreme Court's prior ruling in this case.

1. Rule 77-3, which "has the force of law," *Hollingsworth*, 130 S. Ct. at 711, provides in relevant part as follows:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge.

Ex. 6. As the Supreme Court recognized, this rule prohibits not only "public broadcasting or televising" of trial proceedings, but also "recording for those purposes." *Id*. at 710-11 (quoting Rule 77-3).[3] Accordingly, Chief Judge Walker's decision to record the trial proceedings over Proponents' objection was lawful only on his unequivocal representation that the recordings would not be publicly broadcast beyond the confines of the courthouse.[4]

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[3] The version of Rule 77-3 in force at the time of the Supreme Court's decision in *Hollingsworth* did not contain an exception for public broadcast in connection with a pilot program (though the district court had attempted unlawfully to amend the rule to create such an exception). *See Hollingsworth*, 130 S. Ct. at 712. As discussed below, the public broadcast of the trial proceedings in this case is plainly not authorized in connection with any pilot program.

[4] Chief Judge Walker's decision to permit Plaintiffs to play portions of these video-recordings during closing arguments violated his assurance that the

Furthermore, contrary to the district court's claim that "Rule 77-3 speaks only to the *creation* of digital recordings of judicial proceedings for particular purposes or uses," Ex. 1 at 10, the Rule's separate prohibition against "public broadcasting or televising" of trial proceedings outside "the confines of the court house," Ex. 6, applies by its plain terms regardless of when the public dissemination occurs. Indeed, the Rule's reference to "recording for these purposes" can only be understood as extending the prohibition against "public broadcasting or televising" to subsequent broadcasts of recorded proceedings. Accordingly, regardless of whether the act of recording a particular trial itself is contrary to Rule 77-3, the subsequent public dissemination of trial recordings clearly runs afoul of the distinct "prohibit[ion against] the streaming of transmissions, or other broadcasting or televising, beyond the 'confines of the courthouse.' " *Hollingsworth*, 130 S. Ct. at 711 (quoting Rule 77-3). Thus, contrary to the district court's naked assertion that "[n]othing in the language of Rule 77-3 governs whether digital recordings may be placed into the record," Ex. 1

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recordings would be "simply for use in chambers," Ex. 7 at 754:24-755:4. The closing arguments themselves were not publicly broadcast outside the courthouse, however, and parties were required "to maintain as strictly confidential" their copies of the recordings "pursuant to . . . the protective order." Ex. 11 at 2. Accordingly, the use of the video-recordings in connection with closing arguments did not violate Rule 77-3's prohibition on public broadcast outside the confines of the courthouse. Nor did it violate Judge Walker's assurance, made with reference to this rule, that the recordings would not be used "for purposes of public broadcast or televising." Ex. 7 at 754:21-23.

at 10, Chief Judge Walker's decision to place the trial recordings in the record would have violated this Rule but for his order sealing the recordings and thereby preventing their public dissemination. And lifting the seal to permit public broadcasting of the trial proceedings will plainly violate the Rule. Indeed, any other reading of Rule 77-3 would render it a nullity, for it would give judges determined to broadcast trial proceedings publicly a blueprint for doing so.

2. By permitting public broadcast of the trial, the ruling below also violates the policy of the Judicial Conference, which is "at the very least entitled to respectful consideration," *Hollingsworth*, 130 S. Ct. at 711-12, and of this Court's Judicial Council, which is "binding on all courts within the Ninth Circuit," Ex. 5. The district court's disregard of these policies is plainly a serious matter. *See In re Complaint Against Dist. Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Sept. 28, 2009); *In re Sony BMG Music Entm't*, 564 F.3d 1 (1st Cir. 2009).

Noting this Court's announcement, on December 17, 2009, of a pilot program "to allow the use of cameras in certain district court proceedings," Chief Judge Ware asserted that "at the time the digital recording was made, it was the policy of the Ninth Circuit that the recording of civil non-jury district court proceedings was permissible." Ex. 1 at 11-12. The December 2009 program, however, "was not adopted after notice and comment procedures," as is required by statute. *Hollingsworth*, 130 S. Ct. at 712 (citing 28 U.S.C. § 332(d)(1)). In any

event , this case was formally withdrawn from the purported pilot program promptly after the Supreme Court's decision in this case. *See* Ex. 10; Ex. 24.[5]

3. The district court's decision to unseal its recordings also flatly contravenes the Supreme Court's prior decision in this case. Not only did the Supreme Court hold that the district court's attempt to amend Rule 77-3 was procedurally invalid, *see* Ex. 1 at 9, it also held that the district court's broadcast order violated the substance of that Rule (as well as Judicial Conference policy). *See, e.g.*, *Hollingsworth*, 130 S. Ct. at 713 (holding that Chief Judge Walker's broadcast order "complied *neither* with existing rules or policies *nor* the required procedures for amending them"). Further, as discussed more fully below, the Supreme Court credited Proponents' witnesses' well-substantiated fears of harassment and intimidation, *see id*. at 713-14, and accordingly made clear that even if this Court's Judicial Council had successfully implemented a pilot program allowing public broadcast of trial proceedings, and even if Rule 77-3 had been successfully amended to permit participation in that program, this "high-profile, divisive" case, "involv[ing] issues subject to intense debate in our society," was "not a good one for a pilot program." *Hollingsworth*, 130 S. Ct. at 714.

[5] Although the Judicial Conference recently adopted a pilot program permitting, in certain narrow circumstances, the broadcast of civil trial proceedings, *see* Ex. 1 at 11 n.20, it likewise provides no support for the ruling below given that (1) it did not exist at the time of the trial in this case, and (2) participation in the new program requires the consent of all parties, Ex. 25 at 11.

B. The common-law right of access to judicial records does not support the district court's ruling.

The district court rested its ruling solely on the common-law right "to inspect and copy public records and documents, including judicial records and documents." Ex. 1 at 6. As demonstrated below, however, this common-law right has no application to the video recordings at issue here. Even if it did apply, moreover, this qualified right would not support public access in this case, for the harms that would result from public broadcast far outweigh any potential benefits.

1. The common-law right of access is just that—a judge-made, common-law rule. It "is not absolute, and is not entitled to the same level of protection accorded a constitutional right." *San Jose Mercury News, Inc., v. U.S. Dist. Ct. for the N.D. Cal.*, 187 F.3d 1096, 1102 (9th Cir. 1999). Like every common-law rule, it may be displaced by statute or other positive enactment. *See Ctr. for Nat'l Sec. Studies v. U.S. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003); *see generally Heck v. Humphrey*, 512 U.S. 477, 501 (1994). For example, the common-law right of access is supplanted by Fed. R. Crim. P. 6(e), governing recording and disclosure of grand jury proceedings. *See U.S. v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). It is likewise displaced by Fed. R. Civ. P. 5.2, which does not permit documents containing minors' names to be unsealed unless those names are redacted. *See* Rule

5.2(d). In short, where applicable, "[r]ules, not the common law, now govern." *In re Motions of Dow Jones & Co.*, 142 F.3d at 504.

As demonstrated above, Rule 77-3 would have prohibited the creation of the video-recordings at issue here but for Chief Judge Walker's unequivocal representation that they would not be publicly broadcast outside the courthouse. The Rule likewise would have barred the placement of these recordings in the record but for Chief Judge Walker's sealing order. Chief Judge Ware's decision allowing the common-law right of access to trump a binding rule of the court, *see* Ex. 1 at 10, turns the well-established relationship between common-law and positive enactments on its head.

2. In addition, the video recordings at issue here are simply not the type of judicial record to which the common-law right of access applies. As even Plaintiffs have conceded, *see* Ex. 23 at 12-13, the recordings are not themselves evidence or even argument; rather they are wholly derivative of the evidence offered, and the arguments made, in open court during the trial in this case. Further, the court reporter's transcript, not the video recordings, is the official record of the trial proceedings.[6] And as the Plaintiffs likewise conceded, the public was free to attend the trial in this case and continues to have access to the official

[6] *Cf*. Ex. 35 ("digital recordings emanating from the pilot [project] . . . are not the official record of the proceedings, and should not be used as exhibits or part of any court filing."); *supra* n.4.

trial transcript, which is "widely available on the internet." *See* Pls. Opp. Br. at 3. None of the authorities cited by the district court or the parties below hold—or even suggest—that the common-law right of access requires more.

Indeed, in *U.S. v. McDougal*, 103 F.3d 651, 656-57 (8th Cir. 1996), the Eighth Circuit held that a videotape of President Clinton's deposition testimony (which was played in court in lieu of live testimony) was "not a judicial record to which the common-law right of public access attaches." As the Court explained, "the videotape at issue … is merely an electronic recording of witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom . . . there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony." *Id*.; *see also id*. (distinguishing recordings of "the primary conduct of witnesses or parties"); *cf. In re Sony BMG Music Entm't*, 564 F.3d 1, 8-9 (1st Cir. 2009) ("the venerable right of members of the public to attend federal court proceedings is far removed from an imagined entitlement to view court proceedings remotely on a computer screen"). In this case the video recordings are one step even further removed than in *McDougal* from the type of record to which the common-law right of access applies, for (with the exception of a few brief snippets played during closing arguments), the recordings simply depict the trial proceedings and were not themselves played at trial.

3. Even where the common-law right of access does apply, it "does not mandate disclosure in all cases." *San Jose Mercury News, Inc.*, 187 F.3d at 1102. It merely creates a presumption in favor of access that "can be overcome by sufficiently important countervailing interests." *Id.* Here, as recognized by the Supreme Court, public broadcast of the trial proceedings would subject Proponents' witnesses to a well-substantiated risk of harassment and would prejudice any further trial proceedings that may prove necessary in this case. *See Hollingsworth*, 130 S. Ct. at 713. In addition, public broadcast of the trial in violation of Chief Judge Walker's solemn assurances (and direct circumvention of the Supreme Court's stay, the local rules, and well-settled judicial policy) threatens grave damage to the integrity of the judicial process itself. These threatened injuries are discussed more fully below. Further, this is not a case where the public seeks access to evidence or proceedings hidden from public view: the trial in this case was open to the public, widely reported, and memorialized in an official public transcript. Thus, balanced against the serious risks to Proponents, their witnesses, and the integrity of the judicial process posed by the public broadcast of the video-recording, any applicable common-law right of access must surely yield.

II. PROPONENTS FACE IRREPARABLE HARM ABSENT A STAY.

A. Unsealing the record now will moot Proponents' appeal.

Absent a stay pending appeal, the video-recording of the trial will be unsealed and its widespread dissemination will be immediate. Once that happens,

Proponents' appeal will be moot. They will "not be able to obtain adequate relief through an appeal," for "[t]he trial will have already been broadcast." *Hollingsworth*, 130 S. Ct. at 713. Mootness is by definition an irreparable harm to a party seeking appellate review. *See Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986). This Court should issue a stay pending appeal to preserve its ability to review the district court's order and to provide effective appellate relief.

B. Unsealing the record will place Proponents' witnesses at grave risk of harrassment.

Based on "decades of experience and study," the Judicial Conference has repeatedly found that the public broadcast of trial proceedings "can intimidate litigants [and] witnesses," "create privacy concerns," and "increase[] security and safety issues." *E.g.*, Ex. 3 at 1 -3; *see also Hollingsworth*, 130 S. Ct. at 712-13. "Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level." Ex. 3 at 3. Significantly, these findings are based on the Judicial Conference's study of ordinary, run-of-the-mine cases. "[I]n 'truly high-profile cases' one can '[j]ust imagine what the findings would be.' " *Hollingsworth*, 130 S. Ct. at 714.

As Proponents repeatedly advised Chief Judge Walker before the trial in this "high-profile, divisive" case, *id.* , several of Proponents' expert witnesses voiced "concerns for their own security," *id.* at 714, and made clear "that they [would] not testify if the trial [were] broadcast," *id. at* 713. Chief Judge Walker was wholly

indifferent to this fact and to its obvious implications for the fundamental fairness of the trial itself, for he never even mentioned this consideration as bearing on his decision to broadcast -- and when that was stayed, to video record -- the trial.[7] The Supreme Court however, was acutely concerned that Proponents' witnesses had "substantiated their concerns by citing incidents of past harassment." *Id*. at 713. Indeed, the record reflects repeated harassment of Prop 8 supporters. *See* Ex. 27; Ex. 28 at ¶¶ 10-12; Ex. 29 at ¶¶ 6-8, 12-15; Ex. 30 ; Ex. 31at ¶¶ 5-6; Ex. 32 at ¶ 8; *see also* Thomas M. Messner, *The Price of Prop 8*, *available at* www.heritage.org/ Research/Family/bg2328.cfm; www.youtube.com/watch?v=hcKJEHrvwDI. For example, "donors to groups supporting Proposition 8 'have received death threats and envelopes containing a powdery white substance,' " and "numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters." *Hollingsworth*, 130 S. Ct. at 707. Even Plaintiffs' lead counsel has acknowledged "widespread economic reprisals" against supporters of Proposition 8. Ex. 36 at 28-29 (*cited in Hollingsworth*, 130 S. Ct. at 707). There can thus be little doubt that unsealing the trial recording for

[7] Despite Chief Judge Walker's subsequent assurance that the video-recordings would not be publicly broadcast, all but two of Proponents' experts ultimately did not testify. As counsel for Proponents advised Chief Judge Walker early in the trial, the witnesses "were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Ex. 33 at 1094:18-23.

public broadcast would expose Proponents' witnesses to a serious and well-substantiated risk of harassment or worse.

C. Unsealing the record could prejudice future trial proceedings.

Given that Proponents are currently appealing both the judgment invalidating Proposition 8 and the district court's subsequent denial of our motion to vacate that judgment, it is quite possible that this case will be retried in the future. As noted above, *supra* note 7, only two of Proponents' six scheduled expert witnesses were willing to rely on Chief Judge Walker's unequivocal assurances that the trial recordings were solely for his judicial use in chambers, and to testify at trial. One of those witnesses soon regretted his decision to take Chief Judge Walker at his word, as he watched excerpts of his testimony displayed on national television by Chief Judge Walker himself. *See* http://www.c-spanvideo.org/program/Vaugh. If the video recording of the trial is now unsealed and made public, these witnesses and others would almost certainly refuse to participate in any further trial proceedings in this case, or in any other case raising such highly divisive issues. *See Hollingsworth*, 130 S. Ct. at 713 ("witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings.") Unsealing the recordings would thus surely prejudice any future trial proceedings.

III. A STAY WILL NOT HARM PLAINTIFFS.

Here, as before, "[t]he balance of equities favors" a stay, for "[w]hile applicants have demonstrated the threat of harm they face if the trial is broadcast, [Plaintiffs] have not alleged any harm if the trial is not broadcast." *Hollingsworth*, 130 S. Ct. at 713. And they certainly have identified no harm that they will suffer *during the pendency of this appeal* if a stay is entered.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY.

As Chief Judge Ware recognized, *see* Ex. 23 at 24-25, nothing less than the integrity and reputation of the judiciary is at stake in this case. Chief Judge Walker solemnly and unambiguously represented in open court that the recording of the trial would not be used "for purposes of public broadcasting or televising." Ex. 7 at 754:21-23. He assured the parties that only "some further order of the Supreme Court or the Court of Appeals" could permit transmission beyond the courthouse. Ex. 34. Proponents (and their witnesses who took the stand) took him at his word. They took no action to enforce the Supreme Court's stay or otherwise prevent the recording of the trial. Indeed, in express reliance on Chief Judge Walker's promise, *see* Ex. 18 at 11-12, Proponents forwent their opportunity, invited by the Supreme Court itself, to seek further review from that Court of Chief Judge Walker's broadcast order. And in deciding not to appeal the subsequent order placing the recording in the record *under seal*, Proponents relied on Chief Judge Walker's unequivocal determination—made in the very same opinion placing the recording

in the record—that "the potential for public broadcast" of witness testimony "had been eliminated," Ex. 17 at 35-36. Despite all of this, Chief Judge Walker himself later reneged on his commitment, violated his seal, and ignored Local Rule 77-3 and judicial conference policy by broadcasting excerpts of the trial recording.

Now, Chief Judge Ware, declaring that he is not bound by his predecessor's commitments, Ex. 1 at 8, has permitted public broadcast of the entire trial and has thus exponentially compounded this deeply troubling course of events. If the order under review is permitted to stand, future litigants and witnesses will be on notice that judicial promises are unworthy of confidence, and grave and lasting injury will be done to the integrity and credibility of the federal judiciary.

As discussed above, any countervailing public interest in access to the video-recording of the public trial in this case is small. And any public interest in *immediate, pre-appeal access* is surely negligible. The public interest, like the other equities, thus weighs heavily in favor of a stay.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's order pending appeal. Should the Court disagree, Proponents request in the alternative a limited seven-day stay to permit us to seek a stay pending appeal from the Supreme Court.

9th Circuit Case Number(s) 11-17255

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Sep 23, 2011 .

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Signature (use "s/" format) s/ Charles J. Cooper

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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EXHIBIT 13

FILED

OCT 24 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY; et al.,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

MEDIA COALITION,

Intervenor,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; et al.,

Defendants,

and

DENNIS HOLLINGSWORTH; et al.,

Intervenor-Defendants - Appellants.

No. 11-17255

D.C. No. 3:09-cv-02292-JW
Northern District of California,
San Francisco

ORDER

Before: REINHARDT, HAWKINS, and N.R. SMITH, Circuit Judges.

The emergency motion for a stay pending appeal is GRANTED. The court will expedite consideration of this appeal.

The parties shall submit simultaneous principal briefs no later than November 14 and reply briefs no later than November 28. The length of these briefs is to be governed by Fed. R. App. P. 32(a)(7). The court will not entertain requests for extension of either the length limitations or the briefing schedule.

The court will hear oral argument during the week of December 5, 2011, in San Francisco, on a date to be determined subsequently. Thirty minutes of argument time is allocated to each side. Unless the parties agree otherwise, this time is to be divided equally among the parties and intervenors wishing to present argument on a given side.

EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,

Plaintiffs,

v.

Arnold Schwarzenegger, et al.,

Defendants.

_____/

NO. C 09-02292 JW

ORDER CLOSING CASE

On August 4, 2010, the Court issued an order in this case in which it directed the Clerk to enter judgment in favor of Plaintiffs and Plaintiff-Intervenors and against Defendants and Defendant-Intervenors. (hereafter, "August 4 Order," Docket Item No. 708 at 136.) On August 12, 2010, the Court issued a further order in which it declined to stay the August 4 Order and directed the Clerk to "enter judgment forthwith." (See Docket Item No. 727 at 10-11.) On June 14, 2011, the Court issued an order denying a motion to vacate judgment brought by Defendant-Intervenors. (See Docket Item No. 797.)

Accordingly, in light of the orders discussed above, judgment is entered in favor of: (1) Plaintiffs Kristin M. Perry; Sandra B. Stier; Paul T. Katami; and Jeffrey J. Zarrillo; and (2) Plaintiff-Intervenors Our Family Coalition; Lavender Seniors of the East Bay; Parents, Families, and Friends of Lesbians and Gays and against: (1) Defendants Arnold Schwarzenegger; Edmund G. Brown, Jr.; Mark B. Horton; Linette Scott; Patrick O'Connell; Dean C. Logan; Kamala D. Harris; and Howard Backer; and (2) Defendant-Intervenors Proposition 8 Official Proponents; Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Hak-Shing William Tam; Mark A. Jansson;

ProtectMarriage.com; Campaign for California Families; County of Imperial of the State of California; Board of Supervisors of Imperial County; and Isabel Vargas.

The Clerk shall close this file.

Dated: August 27, 2012

JAMES WARE
United States District Chief Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: August 27, 2012

Richard W. Wieking, Clerk

By: /s/ JW Chambers
William Noble
Courtroom Deputy

United States District Court
For the Northern District of California

EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,

Plaintiffs,

v.

Arnold Schwarzenegger, et al.,

Defendants.
_____/

NO. C 09-02292 JW

JUDGMENT AND AMENDED ORDER CLOSING CASE

On August 4, 2010, the Court issued an order in this case in which it directed the Clerk to enter judgment in favor of Plaintiffs and Plaintiff-Intervenors and against Defendants and Defendant-Intervenors. (hereafter, "August 4 Order," Docket Item No. 708 at 136.) On August 12, 2010, the Court issued a further order in which it declined to stay the August 4 Order and directed the Clerk to "enter judgment forthwith." (See Docket Item No. 727 at 10-11.) The same day, pursuant to the Court's order, a permanent injunction was entered whereby it was "ordered, adjudged and decreed" that Defendants were permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution. (See Docket Item No. 728 at 2.) However, no separate Judgment was issued.[1]

On August 4, 2010, Defendant-Intervenors appealed the Court's August 4 Order, along with prior interlocutory orders of the Court. (Docket Item No. 713.) On April 25, 2011, while their appeal was pending, Defendant-Intervenors filed a motion before this Court seeking to vacate the "final judgment . . . and all orders entered by this Court" pursuant to Fed. R. Civ. P. 62.1. (See

[1] See Fed. R. Civ. P. 58(a) (stating that, with certain exceptions, "[e]very judgment and amended judgment must be set out in a separate document").

Docket Item No. 768 at 1.) On June 14, 2011, the Court issued an order denying that motion to vacate judgment. (See Docket Item No. 797.)

Recently, upon review of the docket, the Court observed that because a separate Judgment was never issued, the case has not been closed. Thus, on August 27, 2012, the Court issued an Order Closing Case. (See Docket Item No. 842.) Subsequently, the parties informed the Court that the August 27 Order requires modification because it incorrectly names certain parties.

Accordingly, in light of the procedural history and orders discussed above, judgment is hereby entered in favor of: (1) Plaintiffs Kristin M. Perry; Sandra B. Stier; Paul T. Katami; and Jeffrey J. Zarrillo; and (2) Plaintiff-Intervenor City and County of San Francisco and against: (1) Defendants Arnold Schwarzenegger; Edmund G. Brown, Jr.; Mark B. Horton; Linette Scott; Patrick O'Connell; Dean C. Logan; Kamala D. Harris; and Howard Backer; and (2) Defendant-Intervenors Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Hak-Shing William Tam; Mark A. Jansson; and ProtectMarriage.com.

This Judgment is entered *nunc pro tunc* to August 12, 2010, the date on which the Court directed that judgment be entered "forthwith."

The Clerk shall close this file.

Dated: August 29, 2012

JAMES WARE
United States District Chief Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: August 29, 2012

Richard W. Wieking, Clerk

By: /s/ JW Chambers
William Noble
Courtroom Deputy

United States District Court
For the Northern District of California

EXHIBIT 16

NOT FOR PUBLICATION

FILED

APR 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY; et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff-Appellee,

KQED, INC.,

Intervenor-Appellee,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; et al.,

Defendants,

and

DENNIS HOLLINGSWORTH; et al.,

Intervenor-Defendants-Appellants.

.

No. 18-15292

D.C. No. 3:09-cv-02292-WHO

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Submitted April 17, 2019**
San Francisco, California

Before: FERNANDEZ, BEA, and N.R. SMITH, Circuit Judges.

In light of the district court's briefing and hearing schedule for a future motion to continue to seal the recording at issue, we presently lack jurisdiction over Proponents' appeal. The district court's order compelling "the recordings be kept under seal . . . until August 12, 2020" is not a "final decision[]" of the district court. *See* 28 U.S.C. § 1291. Nor is it a reviewable collateral order, for the order is not "effectively unreviewable on appeal from a final judgment." *U.S. v. Hickey*, 185 F.3d 1064, 1066 (9th Cir. 1999). Accordingly, this appeal is dismissed without prejudice for lack of jurisdiction.

DISMISSED WITHOUT PREJUDICE.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).